TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 238.

THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY, PLAINTIFF IN ERROR,

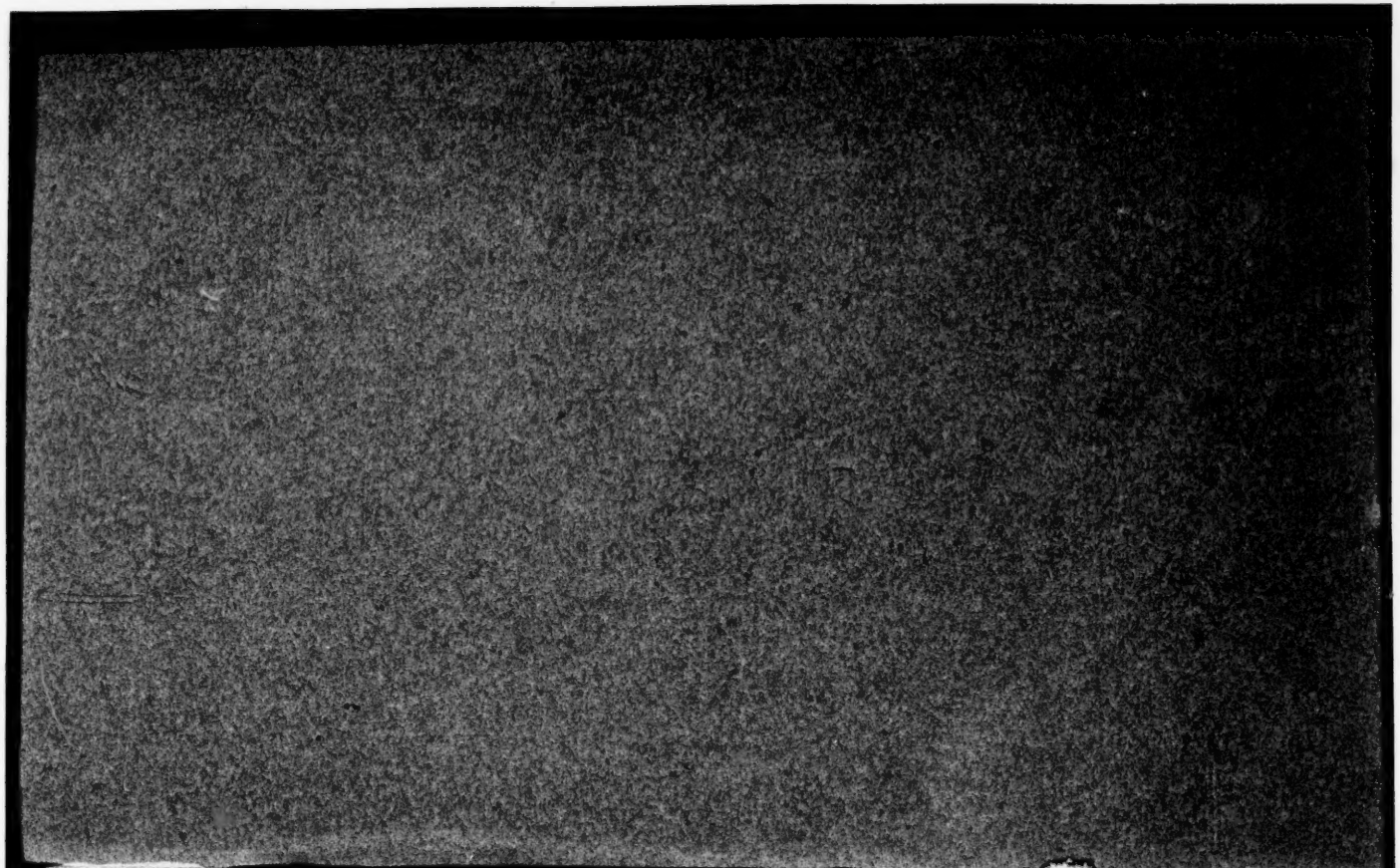
vs.

WILLIAM J. BELL, JOHN W. BELL, FRANK A. BELL, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JUNE 21, 1899.

(16,917.)



(16,917.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 332.

THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM J. BELL, JOHN W. BELL, FRANK A. BELL, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 5, 1898.

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a UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1897, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit; the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, and the Honorable Charles Swayne, United States district judge for the northern district of Florida.

THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY, Plaintiff in Error,
vs.
WM. J. BELL, JOHN W. BELL, FRANK A. BELL, ELIZA A. BELL, Matilda P. Feihe (*née* Bell) and Her Husband, Antone Feihe; George A. Bell, and Simon Bell, Defendants in Error.

Be it remembered that heretofore, to wit, on the 6th day of May, 1897, a transcript of the record of the above-styled cause from the circuit court of the United States for the southern district of Florida was filed in the office of the clerk of said United States circuit court of appeals in the words and figures following, to wit:

1 In the Circuit Court of the United States for the Southern District of Florida.

WILLIAM J. BELL, JOHN W. BELL, Who Are Citizens of the State of Texas; Frank A. Bell, Eliza A. Bell, Matilda P. Feihe (*née* Bell) and Her Husband, Antone Feihe; George A. Bell, and Simon Bell *vs.* THE FLORIDA CENTRAL AND PENINSULAR R. R. Co.	Ejectment. Damage, $30,000.

The clerk will please issue summons *ad res.* in the above cause returnable at Jacksonville, Florida, on the first Monday of January, A. D. 1897.

H. BISBEE,
For Plaintiff.

Statement.

The land in controversy is occupied by defendant and described as its road-bed and right of way across and through lot eight, section 24, township 29 south, range 18 east, in Hillsborough county, State of Florida, and plaintiffs desire of defendant mesne profits and damages to the amount of $30,000.

H. BISBEE,
For Plaintiff.

2 (Endorsed:) Case No. 201, at common law. Appearance docket, page 201, file- box No. 36, left; room No. 28, Government building, Jacksonville, Fla.

In the circuit court of the United States for the southern district of Florida, Wm. J. Bell *et al. vs.* The Florida Central and Peninsular R. R. Co. Præcipe. Filed Dec. 12, 1896. Eugene O. Locke, clerk. H. Bisbee, for plaintiff-.

United States Circuit Court, Fifth Circuit, Southern District of Florida.

The President of the United States to the marshal of the southern district of Florida, Greeting:

You are hereby commanded to summon The Florida Central and Peninsular R. R. Co., if it may be found in your district, to be and appear before the circuit court of the United States, fifth circuit, southern district of Florida, at the rule day of said court, to be held at the clerk's office in the city of Jacksonville, on the first Monday of January, 1897, next, to answer unto William J. Bell, John W. Bell, who are citizens of the State of Texas; Frank A. Bell, Eliza A. Bell, Matilda P. Feihe (*née* Bell) and her husband, Antone Feihe, George A. Bell and Simon Bell, in said court on a plea of ejectment, wherein the plaintiffs claim mesne profits and damages to the amount of thirty thousand dollars. And have you then and there this writ.

[SEAL.] Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of this court, at the city of Jacksonville, in said district, this twelfth day of December, A. D. 1896.

EUGENE O. LOCKE, *Clerk.*

BISBEE & RINEHART,
Plaintiffs' Attorney-.

3 *Statement.*

The land in controversy is occupied by defendant and described as the road-bed and right of way across and through lot eight, section 24, township 29 south, range 18 east, in Hillsborough county, State of Florida, and plaintiffs demand of defendant mesne profits and damages to the amount of $30,000.

H. BISBEE,
For Plaintiffs.

(*Marshal's Return.*)

Came to hand December 15th, 1896, and executed by delivering to John A. Henderson, vice-president of the F. C. & P. R. R. Co., a true copy of the same, at the same time exhibiting this, the original, at *at* Jacksonville, Fla.

JAMES McKAY,
U. S. Marshal,
By JAMES CLARK, *Deputy.*

(File endorsement:) No. 201. United States court, southern district of Florida. William J. Bell *et al. vs.* Florida Central and Peninsular R. R. Co. Summons, issued Dec. 12th, 1896; returnable January 4, 1897; returned and filed Dec. 16, 1897. Louis Starke, deputy clerk. Bisbee & Rinehart, plaintiffs' attorneys.

* * * * * * *

In the Circuit Court of the United States, Southern District of Florida.

WILLIAM J. BELL, JOHN W. BELL, FRANK A. BELL, E. A. BELL, Matilda P. Feihe (*née* Bell), All Heirs of and Children of Louis Bell, Late of Hillsborough County, State of Florida, Deceased; George A. Bell and Simon Bell, Heirs of the Grandchildren
4 of the said Louis Bell, and Antone Feihe, the Husband of said Matilda P. Feihe, Plaintiffs,

vs.

THE FLORIDA CENTRAL & PENINSULAR RAILROAD COMPANY, Defendants.

Damages, $40,000.

William J. Bell, John W. Bell, Frank A. Bell, who, at and before the time this suit was commenced, were citizens of the State of Texas, E. A. Bell, Matilda P. Feihe (*née* Bell), all heirs of and children of Louis Bell, late of Hillsborough county, State of Florida, deceased; George A. Bell and Simon Bell, heirs of and grandchildren of the said Louis Bell, and Antone Feihe, the husband of said Matilda P. Feihe, plaintiffs; by H. Bisbee and Padgett & Forrest, their attorneys, sue The Florida Central and Peninsular Railroad Company, a corporation organized and existing under the laws of Florida, the defendant, because the defendant, heretofore, to wit, in the year A. D. one thousand eight hundred and ninety, took possession of, as its railroad-bed, and right of way, and built its railroad of four tracks across and through and upon a strip and parcel of land, being a part of lot eight, section twenty-four, township twenty-nine south, of range eighteen, east, according to the surveys, maps and plats thereof made by the Government of the United States, and under and according to the laws of the said United States, which said lot eight is in Hillsborough county, State of Florida, and in the said southern district of Florida, which said strip and parcel of land so taken as aforesaid by the defendant, and which the said defendant is in possession of, and was in possession of at the time of the commencement of this suit, contains about seven acres of the value of thirty thousand dollars, to which the plaintiffs claim title; and the defendant has received the rents and
5 profits of said land since the first day of December, A. D. 1889, of the yearly value of four thousand dollars, and refuses to deliver the possession of the said land to the said plaintiffs, or to pay the rents or profits thereof, and the said plaintiffs allege, that in and by the construction of its said railroad, upon, over and through

the said strip and parcel of land by the defendant, the defendant has dug up the said land in making its road-bed, and took away and removed the plaintiffs' fences thereon, and the soil and sand thereof, and other wrongs and trespasses, and injuries, to the said land, and to the plaintiffs' possession and freehold, committed to the plaintiffs' damage of ten thousand dollars, exclusive of such rents and profits, which defendant neglects and refuses to pay to the plaintiffs.

And the plaintiffs allege that they claim title to the said land under and by virtue of a patent granted by the Government of the United States of America to the said Louis Bell and his heirs, upon a pre-emption claim for said land under the laws of the United States, originally commenced and filed in the local land office of the United States of America, at Gainesville, Florida, in 1883, and presented by the heirs of the said Louis Bell and his heirs, the plaintiffs, in said land office; and upon appeal in the General Land Office of the Government, and upon and from an appeal from the decision of the Commissioner of the said General Land Office to the Secretary of the Interior of the said United States, the said heirs prosecuted to the pre-emption claim, until by the order and decision of the said Secretary, the said patent was granted; and plaintiffs allege that at various and sundry times during the said prosecution of the said pre emption claim in the General Land Office aforesaid, and in the office of and before the said Secretary, the defendant claimed, insisted and contended that the plaintiffs were not, under any of the laws of the United States, entitled to have a patent to said
6 land granted to the said Louis Bell and his heirs, and the said defendant at the time of the commencement of this suit, claimed and insisted that the plaintiffs derived no title to the said land under and by virtue of the said patent and at said time claimed that under the laws of the United States of America, and especially under and by virtue of the first section of an act of Congress, entitled "An act granting public lands in alternate sections to the States of Florida and Alabama, to aid in the construction of certain railroads in said States," approved May 17, 1856, it was entitled and had the right to locate the route of its railroad and construct the same through the said lands, and to be in possession thereof, on the ground, among other grounds, that the said section eight, was a part of that tract of land, which constituted at one time a military reservation known as the Fort Brooke military reservation at Tampa, State of Florida.

And plaintiffs allege that after the passage of an act of Congress, entitled "An act to provide for the disposal of abandoned and useless military reservations," approved July 5, 1885, they contended for and claimed title to and a patent to the said parcel of land, under and by virtue of the first proviso of the second section of the last-mentioned act of Congress, both in the office of the said General Land Office and of the Secretary of the Interior, and the defendant appeared in both of the said offices by its counsel, and there claimed and contended and at the commencement of this suit claimed and contended, that plaintiff- were not entitled to a patent or title to said parcel of

land under the said proviso of the said act of Congress, and at the times aforesaid, claimed and insisted that it was entitled to locate the route of its railroad through said parcel of land and to be in
7 the possession thereof under and by force of the third proviso of the aforesaid act of Congress approved May 17, 1856.

To plaintiffs' damage of $40,000.

H. BISBEE,
PAGGETT & FORREST,
For Plaintiffs.

(Endorsed:) Declaration. Filed December 29, 1896. Louis Starke, deputy clerk.

* * * * * * *

In the Circuit Court of the United States, Southern District of Florida.

WILLIAM J. BELL, JOHN W. BELL, FRANK A. BELL, ELIZA A. Bell, Matilda P. Feihe (*née* Bell) and Her Husband, Antone Feihe; Geo. A. Belle, and Simon Bell
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

The clerk of the above-entitled court will please enter an appearance for the defendants in the above-stated cause.

HENDERSON & RANEY,
J. C. COOPER,
Att'ys for Defendant.

Endorsed: Appearance. Fled Jan. 4, 1897. Louis Starke, deputy clerk.

8 In the Circuit Court of the United States, Southern District of Florida.

WILLIAM J. BELL ET AL.
vs.
FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

Now comes the defendant in the above-entitled cause, by John C. Cooper, its attorney, and for a plea to plaintiffs' declaration says it is not guilty as alleged in said declaration.

J. A. HENDERSON,
J. C. COOPER,
Att'ys for Plaintiff.

STATE OF FLORIDA,
County of Duval.

Before me personally appeared T. A. Phillips who being first duly sworn, deposes and says that he is the assistant general manager of The Florida Central and Peninsular Railroad Company, the defendant in the above-entitled cause, and he has read the foregoing plea and that the same is true in substance and in fact.

[SEAL.] T. A. PHILLIPS.

Sworn to and subscribed before me this 1st day of February, A. D. 1897.

C. SYMORE SPENCER,
Notary Public for the State of Florida at Large.

(Endorsed:) Plea. Filed February 1, 1897. E. O. Locke, clerk.

9 In the Circuit Court of the United States, Southern District of Florida.

WILLIAM J. BELL ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

Come now the plaintiffs, H. Bisbee, their attorney and move for an order transferring the above-entitled action to the said court sitting at Tampa, for trial at the next term thereof, upon the ground that the property involved is located in the city of Tampa, aforesaid, and all the witnesses relied upon by the plaintiffs to prove damages by trespass and the rental value of said property reside in the city of Tampa.

Take notice that this motion will be made in said court sitting at Jacksonville on the 8th day of February, 1897, at ten o'clock a. m. or as soon thereafter as the court can hear the motion.

H. BISBEE,
Attorney for Plaintiff-.

To John C. Cooper, Esq., one of the attorneys for the defendant.

Service of foregoing notice and motion accepted this 2d day of February, 1897.

J. C. COOPER.

(Endorsement: Motion to transfer cause. Filed February 5th, 1897. E. O. Locke, clerk, by Louis Starke, deputy clerk. H. Bisbee, attorney for plaintiff-.)

10 United States Circuit Court, Southern District of Florida.

FRIDAY, *February 5th*, 1897.

Present: Hon. James W. Locke, district judge.
Ordered that court be opened.
Whereupon court is opened by due proclamation.

WILLIAM J. BELL ET AL.
vs.
THE F. C. & P. R'Y CO.

Motion to transfer case to Tampa is set for hearing at Tampa on February 10th inst., and motion to file additional pleas in same is continued for hearing at Tampa on same date.

(Minute Book "C," page 516.)

In the United States Circuit Court, Southern District of Florida.

WILLIAM J. BELL, JOHN W. BELL, Who Are Citizens of the State of Texas; Frank A. Bell, Eliza A. Bell, Matilda P. Feihe (*née* Bell) and Her Husband, Antone Feihe; George A. Bell, and Simon Bell
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.
} Ejectment.

To the plaintiffs and their solicitor of record:

You will please take notice that on Friday morning the
11 fifth day of February, A. D. 1897, at 10 o'clock or as soon thereafter as counsel can be heard, we will ask the court's leave to file the pleas, copies of which are herewith served upon you.

J. A. HENDERSON,
J. C. COOPER,
Attorneys for Defendant.

Service accepted, and copy received, this 4th day of February, A. D. 1897.

H. BISBEE,
Attorney for Plaintiffs.

(Endorsed:) Notice. Filed February 5th, 1897. E. O. Locke, clerk, by Louis Starke, deputy clerk.

In the United States Circuit Court, Southern District of Florida.

WILLIAM J. BELL, JOHN W. BELL, Who Are Citizens of the State of Texas; Frank A. Bell, Eliza A. Bell, Matilda P. Feihe (*née* Bell) and Her Husband, Antone Feihe; George A. Bell, and Simon Bell
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD Company.
} Ejectment.

2. Now comes the defendant in the above-stated cause, and for a further plea, filed by leave of court, says: That this honorable
12 court has no jurisdiction and did not have any jurisdiction at the time of the commencement of this suit to entertain said suit, and that defendant admits that before the commencement of this suit that a patent was issued from the United States to Louis Bell and his heirs to all of lot eight (8), section 24, T. 29 S. R. 28 E. and that plaintiffs claim title to said land described in the declaration, as heirs of Louis Bell, under said patent, and this defendant says it is not true that the defendant at the time of the commencement of this suit claimed and insisted that the plaintiff- derived no title to the said land under and by virtue of the said patent and it is not true that at said time or at any time since, the defendant claimed under the laws of the United States of America, or that

under an act of Congress entitled "An act granting public lands in alternate sections of the States of Florida and Alabama, to aid in the construction of certain railroads in said States," approved May 17th, 1886, or under an act of Congress entitled "An act to provide for the disposal and abandonment of useless military reservations," approved July 5th, 1885, or any other act of Congress, or law of the United States, any right, title or interest in said land, or to locate the route of its railroad and construct the same through said land, but this defendant admits that now and at the time of commencement of this suit it had no claim or title and that it does not now and did not at the time of the commencement of this suit assert any claim or title to said land under any act of Congress or law of the United States, wherefore, defendant says that this honorable court should no longer entertain jurisdiction of said suit, and said suit should be dismissed.

3. And for further plea, defendant says, that the plaintiff, Matilda P. Feihe is a person *non compos mentis* and insane and cannot maintain the said above-entitled suit.

4. And for a further plea, defendant says that in December,
13 1889, and in January, 1890, it located and constructed its said road and took possession of said right of way across and through said lot eight, section 24, township 29, south of range 28 east described in plaintiff's declaration and laid its tracks thereon, and has continuously ever since maintained and operated said railroad thereon, and that on the 21st day of December, 1896, it filed its proceedings and petition in the circuit court for the sixth judicial circuit, in and for the county of Hillsborough, State of Florida, for the purpose of having valued and condemned the said land and to acquire title under its right of eminent domain under the laws of the State of Florida, and that process was duly issued upon the said petition and proceeding, as required by the laws of the State of Florida, directed to the plaintiffs, in this suit as defendants to said proceeding, and the said process has been served upon said defendants, who have answered the said petition and that said proceedings are now pending and undisposed of in said court and that in and by the said proceedings and the judgment of said court thereof, this defendant will acquire the title of plaintiffs to the said property and the compensation will be awarded and paid thereunder to the plaintiffs, for their right, title, and interest in the said property.

5. And for a further plea, defendant says that theretofore, to wit, on the 21st day of January, A. D. 1890, the complain-ts and those under whom they claim as heirs-at-law, filed their original bill in this honorable court on the equity side to enjoin defendant from contructing and operating its railroad across said land, and that on the 2nd day of January, 1890, his honor Don A. Pardee, circuit judge, issued an order on said bill for a temporary injunction against defendant, but providing that upon defendant's filing its bond in the sum of $5,000 said injunction should be dis-olved, or on the defendant acquiring title under condemnation proceedings
14 under the laws of the State of Florida, and that said defendant did file the said bond which was approved by the clerk

of this court, through his deputy clerk, at Tampa, Florida, and that on the 22nd day of December, A. D. 1896, said plaintiffs in this suit, by leave of court filed their supplemental bill in the said above-mentioned equity cause in this court setting up the former proceedings on the original bill and that they, as heirs-at-law of Louis Bell had acquired a patent to said land, from the United States and praying for an injunction against the defendant using or occupying any portion of said land, or from running or operating its said railroad upon said land, and that defendant be decreed to have no right to condemn any part of said land under the laws of eminent domain of the State of Florida and to enjoin same, and for compensation to complainant for value of the said land and to remove said railroad from said lot, and for compensation for the use and occupation of said land by defendant and for waste and damage alleged to have been committed on said lot by defendant, and that on February 1st, 1897, this defendant filed its answer to the said supplemental bill, setting up its defences thereto and also alleging that it had not commenced proceedings in the circuit court of the 6th judicial circuit, Hillsborough county, State of Florida, for the purpose of condemning said property under the laws of eminent domain of the State of Florida, and that the said equity cause involves the title to the same land and in all respects the same subject-matter and the same relief as this suit, and that said equity cause is still pending and prosecuted by the complainants.

Wherefore defendant says plaintiffs ought not to maintain this suit against this defendant.

J. A. HENDERSON,
J. C. COOPER,
Attorneys for Defendant.

15 STATE OF FLORIDA, }
County of Duval. }

Before me personally appeared D. E. Maxwell who being first duly sworn, deposes and says that he is the general manager of The Florida Central & Peninsular Railroad Company, the defendant in the above-stated cause, that he has read the foregoing plea and that the same is true in substance and in fact.

D. E. MAXWELL.

Sworn to and subscribed before me this 4th day of February, A. D. 1897.

[SEAL.] C. SYMOUR SPENCER,
Notary Public, State of Florida, at Large.

(Endorsed :)

This cause coming on to be heard upon the motion of the defendant for leave to file additional pleas and upon the motion of the plaintiff to transfer the cause to Tampa for trial and it having been fully heard and considered, and it appearing that none of said pleas constitute a good defence to said action that could not as well be shown under the general plea of not guilty it is ordered that said

motion to file additional pleas be denied and that the order to transfer the cause for trial be granted and that this order be without prejudice to any motion for a stay of an enforcement possession under any judgment which may be recovered on account of any condemnation proceedings.

Tampa, Fla., Feb. 18th, 1897.

JAMES W. LOCKE.

(Endorsed also:) Additional pleas. Offered for filing Feb. 5th, 1897. James W. Locke, judge.

16 In the United States Circuit Court, Southern District of Florida.

WILLIAM J. BELL
vs.
THE FLORIDA CENTRAL AND PENINSULA- RAILROAD Company, a Corporation. } Ejectment.

Now comes the defendant in the above-entitled cause, by its attorneys, John A. Henderson, J. C. Cooper and Peter O. Knight, and moves the court for a continuance of the above-entitled cause, for reasons set forth in the affidavit hereto annexed, and made a part hereof.

J. A. HENDERSON,
J. C. COOPER,
P. O. KNIGHT,
J. B. WALL,
Attorneys for Defendant.

In the United States Circuit Court, Southern District of Florida.

WILLIAM J. BELL ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD Company, a Corporation. } Ejectment.

STATE OF FLORIDA,
County of Hillsborough.

Personally appeared before me on that 10th day of February, A. D. 1897, Peter O. Knight, who being duly sworn, deposes
17 and says, that he is one of the attorneys for the defendant, and has been one of the attorneys of defendant since the year 1889; that during said year 1889, the defendant was constructing its road to the city of Tampa, and the waters of Hillsborough and Tampa bays; that in order to come into said city and reach the waters of said bays, and also to get proper terminal facilities, it was necessary to construct its track on and across lot eight, section twenty-four, township twenty-nine, south range twenty-eight east, that — said time it was impossible to obtain title to said lot eight inasmuch as said lot at said time, belonged to the United States

Government and numerous persons, the names of whom are unknown to the deponent, were at said time, contesting for the title of said lot, from the United States Government and defendant did, at the same time also claim before the U. S. Land Department, the right of way across said lot, and it being impossible for the defendant theretofore, to obtain legal title to said lot, it commenced the construction of said track on and across said lot without permission from any one; that while it was constructing its said track as aforesaid, to wit: on the 21st day of January, 1890, the plaintiffs filed their original bill in this honorable court, on the equity side, to enjoin the defendant from construct- and operating its railroad across said land, and on the 22nd day of January, of said year, his honor, Don A. Pardee, the circuit judge, issued an order on said bill for a temporary injunction against the defendant, but in said order providing however that said defendant, should give a bond in the sum of five thousand dollars, conditioned that whenever the plaintiffs obtained title from the United States Government to said land, that then, and in that event, the defendant should, in good faith, institute condemnation proceedings against said plaintiffs for the purpose of acquiring title to said land; that in pursuance thereof, the said defendant did then and there file its bond, in the sum of five thousand dollars, conditioned, as provided in said
18 order, and with the permission of the United States court did construct its track across said lot eight in the city of Tampa, and did thereafter construct a depot beyond said lot eight, in the city of Tampa and did also continue its track to the waters of Hillsborough bay, which empties into Tampa bay, and did at said point erect costly wharfs and terminal facilities, and said point also being the initial point of various steamboat lines; and did soon thereafter commence the operation of its line of railway, and has ever since said time operated the line of railway from the waters of Hillsborough bay and Tampa bay and the city of Tampa, on and across said lot eight to the city of Jacksonville, and thence to the city of Savannah, and from thence to the city of Columbia and from thence by connecting carriers to the city of New York; that its track constructed on and across said lot eight, is now its main line, as aforesaid; and that said litigation before the Land Department, above mentioned, continued for years, and it was impossible during all said time for the defendant to acquire title to said land; that after protracted litigation in said department a patent was finally issued to the plaintiffs aforesaid for said lot eight; that some time thereafter, said patent was placed of record, in the office of the clerk of the circuit court for Hillsborough county, Florida; thereafter and in accordance with the order above mentioned, made in the equity suit, the defendant, in good faith, instituted condemnation proceedings against the plaintiff, for the purpose of acquiring title to the land that its track is located upon; that proper process was issued in said condemnation proceedings and directed to the plaintiffs in this suit, and that said plaintiffs represented by their attorney, Horatio Bisbee, have filed an answer to the petition, and that said condemnation proceedings are now pending in said court, to wit:

in the circuit court for Hillsborough county, Florida, and are in good faith being prosecuted by the defendant.

19 Defendant further avers that they, the said condemnation proceedings, will be pushed to a speedy termination, as quickly as possible.

Deponent further avers that it is now engaged in the carriage of freight and passengers to a very large extent, between the city of Tampa, the waters of Hillsborough and Tampa bays and the points above indicated, that it is impossible to bring said freight into the city of Tampa and its terminal facilities, unless it is over this said lot eight, and to eject the said defendant from said lot eight, would be to cause it irreparable injury, and will greatly interfere with the interests of the public in the carriage of freight and passengers.

[SEAL.] PETER O. KNIGHT.

Sworn to and subscribed before — on this 10th day of February, A. D. 1897.

[SEAL.] PAUL WORTH SMITH,
Notary Public.

(Endorsed:) Motion and affidavit for continuance. Filed this 10th day of February, A. D. 1897. E. O. Locke, clerk, by H. L. Crane, deputy clerk. J. A. Henderson, J. C. Cooper, J. B. Wall, Peter O. Knight, attorneys for defendants.

On consideration of this motion for continuance it is ordered on February 18, 1897, in open court, that this motion be denied. (From minutes.)

20 In the United States Court, Southern District of Florida.

WILLIAM J. BELL ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

Now comes the defendant in the above cause on this day and moves the court to dismiss said cause, for the reason that there is nothing upon the face of the declaration to show that this court has jurisdiction to hear and determine the said cause.

JOHN A. HENDERSON,
J. C. COOPER,
J. B. WALL,
P. O. KNIGHT,
Attorneys for Defendants.

(Endorsement:) Motion to dismiss. Filed this 5th day of March, A. D. 1897. E. O. Locke, clerk, by H. L. Crane, deputy clerk.

On consideration of this motion to dismiss, it is ordered in open court, March 11, 1897, that said motion be dismissed. (See minutes.)

21 In the Circuit Court for the Fifth Judicial Circuit of the United States in and for the Southern District of Florida.

WILLIAM J. BELL ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

Now comes the above-named parties, plaintiffs, and defendant, by their respective counsel and hereby agree to waive a jury, and that the action may be tried by the court without a jury.

Done on this, the 11th day of March, A. D. 1897.

H. BISBEE,
Attorney for Plaintiffs.
J. A. HENDERSON,
J. C. COOPER,
J. B. WALL,
P. O. KNIGHT,
Attorneys for Defendant.

(Endorsed:) Agreement of counsel to submit the case to the court without a jury. Filed March 11, A. D. 1897. E. O. Locke, clerk, by H. L. Crane, deputy clerk.

22 United States Circuit Court, Southern District of Florida.

THURSDAY, *March 11th*, 1896.

Present: Honorable James W. Locke, district judge.

Ordered that court be opened.

Whereupon court is opened by due proclamation.

WILLIAM J. BELL ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY. } Ejectment.

This cause now coming on for trial and by consent of parties by their attorneys, a jury is waived and submitted to the court.

And there are sworn and testify H. L. Crane, Benj. Rush, Frank A. Bell, George Booker, Chauncy W. Wells, W. H. Garrett, Theodore H. Williams, Alfred Wagner, Ralph Sevier, George R. Macfarlane, Paul B. Lalane for plaintiffs and M. E. Gerow, A. J. Knight, F. A. Solomanson, W. H. Beckwith, J. S. McFall, I. S. Giddens and Charles E. Ball, for defendant.

And it was agreed by counsel that the case by plaintiff- against the Standard Oil Co. be tried with this cause.

And court is adjourned till 8.30 a. m., 12th inst.

23 United States Circuit Court, Southern District of Florida.

FRIDAY, *March 12th*, 1897.

Present: Hon. James W. Locke, district judge.
Ordered that court be opened.
Whereupon court is opened by due proclamation.

WILLIAM J. BELL ET AL.
vs.
FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

This day again came the parties by their attorneys and testimony is resumed and there are sworn and testify J. B. Seckinger, W. H. C. Caruthers, F. J. La Penotier, and W. H. Garrett for plaintiffs, and D. B. Givens and J. H. Neff for defendants, and arguments are heard and the court takes the case under consideration.
And court adjourns till 8.30 a. m., 13th inst.

SATURDAY, *March 13th*, 1897.

Present: Hon. James W. Locke, district judge.
Ordered that court be opened.
24 Whereupon court is opened by due proclamation.

WILLIAM J. BELL ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

On motion of plaintiff- by their attorney ordered that this cause be transferred to Jacksonville, Fla.

Circuit Court of the United States, Southern District of Florida.

WILLIAM J. BELL ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

This cause coming on for a hearing by the court without a jury, a jury having been waived herein by a stipulation by the parties in writing, and having been fully heard by the introduction of documentary evidence and the testimony of witnesses, and, being duly considered, the court finds as matters of law that the plaintiffs are entitled to possession of and have a fee-simple title in and to the land hereafter described and the undivided interests of the
25 plaintiffs in and to the said land are as follows, to wit: William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell and Matilda P. Feihe (*née* Bell) have and own each one undivided sixth part and interest in the said land, and that George A. Bell and Simon Bell have and own each one undivided twelfth part and interest in said lands.

And the court further finds as a matter of law that the plaintiffs have at all times within seven years next before the commencement of this action been entitled to the exclusive possession of said tract

or lot of land hereinafter described and are entitled to such amount in the form of judgment for damages and mesne profits as will fully compensate them for any damages that have been sustained and loss of rents of profits which have been caused by the unlawful trespass and possession of the defendant herein.

And the court further finds as a matter of fact that in damages and in loss of rents and profits the plaintiffs have been injured and damaged to the extent of ($1,955) one thousand nine hundred and fifty-five dollars.

And the court further finds as a mixed matter of law and fact for the plaintiffs and that they should have judgment for the shares and portions as found in the first finding, to wit: William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, Matilda P. Feihe (*née* Bell) each one sixth part, and George A. Bell and Simon Bell each one-twelfth part in fee-simple interest in and to the following-described lot or tract of land, to wit: A strip and parcel of land being a part of lot 8, section 24, township 29 south, range 18 east, of the meridian of Tallahassee, State of Florida, and county of Hillsborough, known and described as follows, to wit: Beginning at a point in the east boundary line of said lot 8, at a distance of 75 feet in a south direction from the northeast corner of said lot, running southwesterly parallel to the northwesterly boundary
26 line of said lot, to the western boundary line of said lot 8, (1,424 ft.) fourteen hundred and twenty-four feet, thence south on said western boundary line of 75 feet, thence northeasterly on a line parallel to said northwestern boundary line of said lot to the eastern boundary line of said lot, thence north along said eastern boundary line of 75 feet to the place of beginning. And the court further assesses their damages for injury, use and occupation while said land has been held and occupied by said defendant company at $1,955, for which judgment should be given.

Done in open court this 23rd day of March, A. D. 1897.

JAMES W. LOCKE, *Judge.*

Endorsement: W. J. Bell *vs.* The F. C. & P. R'y Co. Findings of court. Filed March 23, 1897. E. O. Locke, clerk, by Louis Starke, deputy clerk.

United States Circuit Court, Southern District of Florida.

It is considered by the court that the plaintiffs herein, William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell and Matilda P. Feihe (*née* Bell) and George A. Bell and Simon Bell, do receive and recover from the defendant, The Florida Central and Peninsular Railroad Company, the sum of nineteen hundred and fifty-four dollars as well as —— for costs in this behalf and it is fur-
27 ther considered that said plaintiffs have a fee-simple title in and to the lands and premises described as follows, to wit:

A strip and parcel of land lying and being a part of lot eight (8), section twenty four (24), township twenty-nine (29) south, of range eighteen (18) east, of the meridian of Tallahassee, in county of

Hillsborough, State of Florida, beginning at a point in the east boundary line of said lot eight (8), at a distance of seventy-five (75) feet, in a south direction from the northeast corner of said lot, and running southeasterly parallel to the northwesterly boundary line of said lot to the western boundary line of said lot eight (8) fourteen hundred and twenty-four (1,424) feet, thence south on said western boundary line seventy-five (75) feet, thence northeasterly on a line parallel to the said northwestern boundary line of said lot to the eastern boundary of said lot; thence north along said eastern boundary line seventy-five (75) feet to the place of beginning.

Attest: E. O. LOCKE, *Clerk.*

March 23d, 1897.

(Judgment Record, page 78, series "A," circuit court.)

In the Circuit Court of the United States in and for the Southern District of Florida.

WILLIAM J. BELL ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

Assignment of Errors.

28 Now comes the above-named defendant, by its attorneys and assigns the following errors in the above-entitled cause:

First. The court below held and decided, that although William J. Bell and John W. Bell, of the plaintiffs, were citizens of the State of Texas, Frank A. Bell, E. A. Bell, Matilda P. Feihe, George A. Bell, and Simon L. Bell, of plaintiffs, were citizens of the State of Florida, and defendant a corporation, organized and existing under the laws of the State of Florida, that said court had jurisdiction of said cause, and this decision and the ruling of said court defendant assigns as error.

Second. The court below, held and decided, that although the defendant admitted that before the commencement of the suit in ejectment, that a patent was issued from the United States to the plaintiffs, for the land described in plaintiffs' declaration, and that defendant did not at the time of the commencement of the suit, nor at the time of filing of the pleas, claim and insist that plaintiffs derived no title to the said land, and although the defendant insisted that it did not claim any title to said land, under the laws of the United States of America, or under any act of Congress or any law of the United States, but that it admitted absolutely the title of the plaintiffs, under and by virtue of the patent issued, yet that said court had jurisdiction of said cause. And this decision and ruling of said court, defendant assigns as error.

Third. The court below refused to permit the defendant to file the additional pleas numbered 2, 3, 4 and 5. And this decision and ruling of said court defendant assigns as error.

Fourth. The court below refused to grant defendant's motion to

dismiss for want of jurisdiction. And this decision and ruling of said court, defendant assigns as error.

29 Fifth. The court below refused to grant defendant's motion to continue said cause for the reason that the condemnation suit was pending. And this decision and ruling of said court defendant assigns as error.

Sixth. During the trial of said cause the defendant offered in evidence a certain chancery suit, instituted in December, 1889, by plaintiffs against defendant, to enjoin the defendant from entering on the land described in plaintiffs' declaration, in which said chancery suit, the fact was set forth fully that no one, at said time had title to said land, and in which said chancery suit, an order was made, by the Honorable Don A. Pardee, as judge of the United States circuit court, permitting the defendant to enter upon said lands and construct its track thereupon, conditioned that it should acquire title by condemnation, whenever a patent was issued by the United States Government to plaintiffs, said proceedings being introduced for the purpose of showing the manner and good faith of the entering upon said land by defendant, and the court did decline to permit the defendant to introduce said chancery record in said cause as evidence. And this ruling and decision of said court defendant assigns as error.

Seventh. That the court erred in finding and deciding as a matter of law that plaintiffs have, at all times, within seven years next before the commencement of this action, been entitled to the exclusive possession of said tract, or lot of land, hereinafter described, and entitled to such an amount in the form of damages and mesne profits, as would fully compensate them for any damages that have been sustained and any loss of rents, and profits which have been caused by the unlawful tresspass and possession of the defendant. And this the defendant assigns as error.

Eighth. That the court erred in finding that plaintiffs were
30 entitled to damages for any mesne profits prior to the date of the issuance of the United States patent to them.

Ninth. That the court erred in finding that the plaintiffs were entitled to damages and to mesne profits prior to the time that there was a final adjudication of the right and title of the litigants to this property by the Secretary of the Interior.

Tenth. That the court erred in finding, as a matter of fact, that in damages and in the loss of rents and profits, the plaintiffs have been injured and damaged to the extent of one thousand and nine hundred and fifty-five dollars.

Eleventh. The court below held and decided, that although there was no description by *meets* and bounds, or otherwise in plaintiffs' declaration, of the land in controversy, as required by the statute of the State of Florida, yet the court held and decided that the plaintiffs were entitled to their respective shares, as set forth in the findings of the court, to the following-described lot or tract of land, to wit: a strip and parcel of land being a part of lot eight, section twenty-four, township twenty-nine, south range eighteen east of the meridian of Tallahassee, State of Florida, and county of Hillsborough,

known and described as follows, to wit: Beginning at a point in the east bound-ry line of said lot eight, at a distance of seventy-five feet in a south direction, from the northeast corner of said lot, running southwesterly parallel to the northwesterly boundary line of said lot, to the western boundary line of said lot eight (1,424) feet, fourteen hundred and twenty-four feet; thence south on said western boundary line 75 feet; thence northeasterly, on a line parallel to the said northwestern boundary line of said lot, to the eastern boundary of said lot, thence north along said eastern boundary line 75 feet to the place of beginning. And this finding of law and fact the defendant assigns as error.

31 Twelfth. That the court erred in finding that there was any description in the declaration, or any description of the land in controversy in evidence, sufficient upon which to base a finding or judgment, contemplated by the statutes of Florida.

JOHN A. HENDERSON,
J. C. COOPER,
P. O. KNIGHT,
Attorneys for Defendant.

(Endorsed:) Assignment of errors. Filed April 10th, 1897. E. O. Locke, clerk, by Louis Starke, deputy clerk.

In the United States Circuit Court, Southern District of Florida, at Common Law.

WILLIAM J. BELL ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

The defendant in the above-entitled cause, by its attorneys, moves the court for a writ of error and a citation to review the judgment in said cause, returnable to the United States circuit court of appeals, according to law and for a supersedeas of the said judg-

32 ment upon the filing of a bond with good and sufficient security as may be directed by the court and required by law.

J. A. HENDERSON,
J. C. COOPER,
Attorneys for Defendant.

(Endorsed:) Motion for writ of error. Filed April 10, 1897. E. O. Locke, clerk, by Louis Starke, deputy clerk.

In the Circuit Court of the United States, Southern District of Florida.

WILLIAM J. BELL ET AL.
vs.
FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

The above-entitled cause coming on to be heard on motion of the defendant The Florida, Central and Peninsular Railroad Company

by its attorneys for a writ of error from the judgment of this court in said cause to the United States circuit court of appeals for the fifth circuit, and for a citation to the plaintiffs, as defendants in error returnable thirty days from date of said citation as required by law, and for an order of supersedeas of the judgment herein.

Ordered, that writ of error and citation be allowed as required by law and the rule of practice, and that on the defendant in the
33 above-stated cause filing bond and sufficient sureties in the sum of thirty-five hundred dollars ($3,500) to be approved by this court, or the clerk thereof, that the same operate as a supersedeas of the judgment in said cause.

Done in open court at Jacksonville, this 10th day of April, A. D. 1897.

JAMES W. LOCKE, *Judge.*

(Endorsed :) Order for writ of error, citation, &c. Filed April 10, 1897. E. O. Locke, clerk, by Louis Starke, deputy clerk.

In the Circuit Court of the United States, Southern District of Florida.

WILLIAM J. BELL, JOHN W. BELL, FRANK A. BELL, ELIZA A. BELL, Matilda P. Feihe and Her Husband, Antone Feihe; Geo. A. Bell, and Simon Bell

vs.

THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

Know all men by these presents, that we, The Florida, Central and Peninsular Railroad Company, a corporation existing and doing business under the laws of the State of Florida, as principal, and W. Bayard Cutting and H. Rieman Duval as sureties are
34 held and firmly bound unto William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, Matilda P. Feihe, Antone Feihe, George A. Bell and Simon Bell in the sum of thirty-five hundred dollars ($3,500) to be paid to the said William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, Matilda P. Feihe, Antone Feihe, George A. Bell and Simon Bell, their heirs, executors, administrators, firmly by these presents.

Sealed with our seals and dated this 1st day of April, 1897.

Whereas, the above-named defendant, The Florida, Central and Peninsular Railroad Company, a corporation existing and doing business under the laws of the State of Florida, has prosecuted a writ of error to the United States circuit court of appeals for the fifth circuit to reverse the judgment rendered in the above-entitled cause in the circuit court of the United States for the fifth judicial circuit in and for the southern district of Florida :

Now therefore, the condition of this obligation is such that if the above-named defendant, The Florida Central and Peninsular Railroad Company, a corporation under the laws of the State of Florida shall prosecute its said writ of error to effect and answer all costs

and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY,
By H. R. DUVAL, *President.*

Sureties:

W. BAYARD CUTTING. [SEAL.]
H. RIEMAN DUVAL. [SEAL.]

Witnesses:
J. W. MILLER.
E. R. HOADLEY.

35 Attested by me as secretary of and with the seal of the said Florida Central and Peninsular Railroad Company, which seal is affixed hereto by me, I being duly thereunto authorized.

[SEAL.] E. R. HOADLEY,
As Secretary of the Florida Central and Peninsular Railroad Company.

STATE OF NEW YORK, }
County of New York. }

Before me personally appeared W. Bayard Cutting, who being sworn in due form of law, deposes and says that he is worth the sum of thirty-five hundred dollars ($3,500) in visible unincumbered property, subject to execution, over and above his legal exemptions and liabilities.

W. BAYARD CUTTING.

Sworn to and subscribed before me this 1st day of April, A. D. 1897.

[SEAL.] JOHN D. MILLER, JR.,
Notary Public, Kings County.

Certificate filed in New York.

(Endorsed:) Wm. J. Bell *et al. vs.* Fla. Cent. and Penn. R. R. Co. Filed this 10th April, A. D. 1897. E. O. Locke, clerk, by Louis Starke, deputy clerk. Bond.

STATE OF NEW YORK, }
County of New York. }

36 Before me personally appeared H. R. Duval, who being sworn in due form of law, deposes and says he is worth the sum of thirty-five hundred dollars ($3,500) in visible and unincumbered property subject to execution over and above his legal exemptions and liabilities.

H. RIEMAN DUVAL.

Sworn to and subscribed before me this 1st day of April, A. D. 1897.

JOHN D. MILLER,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in New York county.

Taken and approved by me, this 10th day of April, 1897.

JAMES W. LOCKE, *Judge.*

(Endorsed:) In the United States circuit court, fifth circuit, southern district of Florida. Wm. J. Bell *vs.* Florida Central and Peninsular Railroad Company. Filed and docketed this 10th day of April, A. D. 1897. E. O. Locke, clerk, by Louis Starke, deputy clerk. Bond.

In the United States Circuit Court, Southern District of Florida.

WILLIAM J. BELL
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

To the plaintiffs and their attorney, Horatio Bisbee, Esq.:

You will please take notice that on Friday, the 16th day of
37 April, A. D. 1897, at ten o'clock a. m., or as soon thereafter as counsel can be heard, the defendant in the above-stated cause, by its attorneys, will present the bill of exceptions in said cause to the Honorable J. W. Locke, judge of said court, at Jacksonville, Fla., and ask that the same be settled and signed.

J. A. HENDERSON,
J. C. COOPER,
Attorneys for Defendant.

STATE OF FLORIDA,
County of Duval.

Before me personally appeared C. Lyman Spencer, who being first duly sworn deposes and says that he served the foregoing notice on Horatio Bisbee, Esq., attorney for plaintiffs, by leaving a true and correct copy of said notice at the office of said Horatio Bisbee in the city of Jacksonville, Fla., on the 10th day of April A. D. 1897, with G. C. Bedell, Esq., who was then and there in charge of said office, and affiant further says that he left the bill of exceptions in said cause in the office of said Bisbee on said 10th day of April, A. D. 1897, for examination by said H. Bisbee, Esq.

C. LYMAN SPENCER.

Sworn to and subscribed before me this 14th day of April, A. D. 1897.

E. J. L'ENGLE,
Notary Public, State of Florida at Large.

(Endorsed:) Wm. J. Bell *vs.* Florida Central and Peninsular Railroad Co. Filed this 16th day of April, A. D. 1897. E. O. Locke, clerk. Notice of settling bill of exceptions.

38 In the Circuit Court of the United States in and for the Southern District of Florida.

WILLIAM J. BELL ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

Bill of Exceptions.

February Term, A. D. 1897.

Be it remembered that at a term of the circuit court of the United States, in and for the southern district of Florida, held in the city of Tampa, on the 11th day of March, A. D. 1897, a cause therein pending, wherein William J. Bell, *et al.*, were plaintiffs and The Florida Central and Peninsular Railroad Company, a corporation, existing under the laws of the State of Florida, was defendant, came on to be heard before the Honorable James W. Locke, judge of said court, at which date came the parties, by their respective attorneys, and thereupon the said parties, by their said attorneys, did consent and agree in writing to waive a trial by jury in said cause, and that the same, including all issues of law and fact, should be tried by the said judge, as appears by the following written stipulation and agreement between the said parties:

39 In the Circuit Court of the 5th Judicial Circuit of the United States in and for the Southern District of Florida.

WILLIAM J. BELL ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

Now come the above-named parties, plaintiffs and defendant, by their respective counsel and hereby agree to waive a jury, and that the action may be tried by the court without a jury.

Done on this the 11th day of March, A. D. 1897.

H. BISBEE,
Attorney for Plaintiffs.
JOHN A. HENDERSON,
J. C. COOPER,
J. B. WALL,
P. O. KNIGHT,
Attorneys for Defendant.

Endorsed as follows: In the circuit court, southern district of Florida. William J. Bell *et al. vs.* Florida Central and Peninsular Railroad Company. Agreement of counsel to submit cause to the court without a jury. Filed this 11th day of March, A. D. 1897. E. O. Locke, clerk, by H. L. Crane, deputy clerk.

40 The patent of the United States Government to Louis Bell and his heirs is offered in evidence by counsel for plaintiff-, Hon. Horatio Bisbee, and is read in evidence.

There is no objection.

The patent, with the endorsement thereon, is as follows:

83612.

B. L. Q. C. L.

M. F. H.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Feb. 20th*, 1897.

I, E. F. Best, Assistant Commissioner of the General Land Office, do hereby certify that the annexed copy of Gainesville, Florida, cash certificate No. 16065, in favor of the heirs of Louis Bell, with the receiver's and register's declaratory statement filed in the case, — true and literal exemplification- of the original papers on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington on the day and year above written.

[SEAL.] E. F. BEST,
Ass't Commissioner of the General Land Office.

McL.

No. 16065.

41 LAND OFFICE AT GAINESVILLE, FLA., *September* 11, 1895.

It is hereby certified that in pursuance of law, the heirs of Louis Bell, deceased, residing at Tampa, in Hillsborough county, State of Florida, on this day purchased of the register of this office the lot eight of sec. No. 24, in township No. 29, south of range 18 east, of the Tallahassee principal meridian, Florida, containing 16.73 acres, at the rate of one dollar and twenty-five cents per acre, amounting to twenty dollars and ninety-two cents, for which the said heirs of Louis Bell, deceased, has made payment in full as required by law.

Now, therefore, be it known that on presentation of this certificate to the Commissioner of the General Land Office the said heirs of Louis Bell, deceased, shall be entitled to receive a patent for the lot above described.

J. M. BARCO, *Register.*

Pre-emption D. S. 569, C. L. G., Sept. 5, 1895.

Across the face thereof in red ink is the following:

Louis Bell. I hereby certify that the correction herein made is in accordance with the instructions contained in C. G. L. of July 22, 1896. J. M. Barco, register.

The endorsements on the back thereof are as follows:

Vol. 1, p. 54. Dec. 2–38, 173, Nov. 26, '95. Hof. (4–189) No. 16065. Cash entry. Land office at Gainesville, Fla., sec. 24, town. 29 S., range 18 E. Department of the Interior received doc. Nov. 30, 1895, 23 L. & R. R. div. No. 436. 1896 send patent 76996 to Padgett & Forrest, city. July 18, '96. A. R. special sec. div. G. list No. 30. Approved July 29, '96, by Farrar, clerk. Division —. Patented July 29, 1896. Recorded vol 23, page 138.

42 (4–406.)

The United States of America to all to whom these presents shall come, Greeting:

Certificate No. 16065.

Whereas, Louis Bell, of Hillsborough county, Florida, has deposited in the General Land Office of the United States a certificate of the register of the land office at Gainesville, Florida, whereby it appears that full payment has been made by the said Louis Bell, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of public lands," and the acts supplemental thereto for the lot numbered eight, of section twenty-four, in township twenty-nine, south of range eighteen, east of Tallahassee meridian in Florida, containing sixteen acres and seventy-three-hundredths of an acre according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Louis Bell.

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant unto the said Louis Bell and to his heirs, the said tract above described, to have and to hold the same, together with all rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging, unto the said Louis Bell and to his heirs and assigns forever.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

43 Given under my hand at the city of Washington, the twenty-ninth day of July, in the year of our Lord one thousand, eight hundred and ninety-six, and of the Independence of the United States, the one hundred and twenty-first.

By the President:

GROVER CLEVELAND,
By M. McKEAN, *Secretary.*

[SEAL.] L. Q. C. LAMAR,
Recorded of the General Land Office.

Recorded, volume 23, page 138.

STATE OF FLORIDA, }
County of Hillsborough. }

Be it remembered that on the 3d day of December, A. D. 1896, the annexed instrument of writing was presented and filed for record with the subscriber, clerk circuit court for said county, and the same being properly authenticated, I have duly recorded the same in Book No. 1 of Patents on page 173.

Witness Charles Wright, clerk, and the seal of our said court at Tampa, Florida, this 3d day of December, 1896.

[SEAL.] CHAS. WRIGHT, *Clerk*,
By —— ——, *Deputy Clerk*.

44 The endorsements on the back thereof are as follows: Bell patent. Bell *et al. vs.* F. C. & P. R. R. Co. and Standard Oil Co. Bell *et al. vs.* Frank Boldt *et al.*

STATE OF FLORIDA, }
County of Hillsborough, } ss:

Filed for record on the 3d day of December, A. D. 1896, at — o'clock — m., and recorded in Book No. 1 of Patents, page 173. Chas. Wright, clerk circuit court, by —— ——, deputy clerk. Record verified. Chas. Wright, clerk circuit court. Read in evidence before the circuit court of the United States, southern district of Florida, this 11th day of March, A. D. 1897, by plaintiff and filed.

E. O. LOCKE, *Clerk*,
By H. L. CRANE,
Deputy Clerk.

Counsel for plaintiff also offer in evidence a certain document from the Interior Department, copy of final certificate and statement of the filing of the declaratory statement and the date thereof.

There is no objection.

The same is read in evidence and is as follows:

45 McL. (4–536.)

$2.00. LAND OFFICE, GAINESVILLE, FLA., *March 30th*, 1883.

Mr. Louis Bell has this day paid — dollars, the register's and receiver's fees, to file a declaratory statement, the receipt whereof is hereby acknowledged.

JOHN F. ROLLINS, *Receiver*.

No. 569.

Mr. Louis Bell having paid the fees, has this day filed in this office his declaratory statement; No. 569, for lots 8, 9 and 10, section 24, township 29, south range 18 east, and lots 16, section 18 and lots 12, 13 and 14 in section 19, township 29, south of range 19 east containing 148.11 acres, settled upon March 25th, 1838, being — offered.

Under the provisions of the pre-emption laws, the time within which final proof is required to be made on unoffered lands expires in thirty-three months from date of settlement, or from date of filing of township plat in district land office in case of settlement on unsurveyed lands, and on offered lands in twelve months from date of settlement; and under act of March 3, 1879, notice of intention to prove up must be given by publication in a newspaper, to be designated by the register, for a period of thirty days, or in six

consecutive issues of said paper, which notice must also contain the names of the witnesses by whom the necessary facts will be established.

Notice is, therefore, hereby given that this pre-emption
46 filing expires on March 25th, 1884, after which date the tract will be subject to the claim of any other qualified party.

Very respectfully, L. A. BARNES, *Register.*

The endorsement- on the back thereof are as follows: Copy of final certificate and declaratory statement. A. Bell *et al. vs.* F. C. & P. R. R. Co. and Standard Oil Co. Read in evidence before the circuit court of the United States for southern district of Florida by plaintiff. Filed this 11th day of March, A. D. 1897; E. O. Locke, clerk, by H. L. Crane, deputy clerk.

It is admitted that the plaintiffs in the suit are the heirs of Louis Bell.

By Mr. BISBEE: The object of the last piece of testimony offered, and that which I shall at present offer, is to establish the fact that the pre-emptor has full- complied with the laws of the United States; that he was not only entitled to the possession of the property against the United States, but against everybody else; and if, therefore, he had the right to maintain this suit, his heirs have, for damages that accrued, prior to the issuing of the patent. These are certified copies of the opinion of the Secretary of the Interior, showing the reason. I wish to state to the court, the fact was, if the court please, that soon after this declaratory statement was filed, under instructions from the General Land Office to the local land office *to the local land office* at Gainesville, they prohibited
47 filing any entries for this land and prohibited and refused to receive proof, required by statute, on the part of Mr. Bell, in order to prove up his claim as pre-emptor, and refused to receive money in payment, and the object of this testimony, together with other testimony, is to establish that the local land office misconstrued the law, in refusing us the right which we had. They refused to take the proof and money and issue a patent. It was then the rule of the Supreme Court of the United States and which then existed, that the refusal of the receiver of the land office, to perform his duty, by misconstruing the law and refusing to receive the money, does not effect the right of the entryman, and that his rights are termed to be vested, when he has made offer of proof and offered the money, and been refused, just the same as if a patent had been issued to him. I do not wish to read all of that, only small portions that belong to this particular point in the case.

By Mr. KNIGHT: If your honor please, I do not agree with the counsel for plaintiff, as to the proposition of law announced by them, for the purpose of showing the location of this property, and tending to show the circumstances under which the railroad company, came onto this property. With that exception the defendant offers no objection to the introduction of them.

By Mr. BISBEE: Being tried without a jury, if your honor please

I would suggest that unless it is something very vital, that all questions of law be reserved until the testimony is in.

By Mr. BISBEE: I also offer in evidence, a certified copy of a communication, from the commissioner of the local land office, dated November 4th, 1895, for the purpose of showing that the railroad company applied for and insisted that a patent be granted
48 for its right of way over that land. I have the same statement to make in connection with that.

It is read to *to* the court. The certified copies of the letter from the Commissioner of the General Land Office, dated November 4th, 1895, are offered in evidence, as are also certified copies of the opinion of the Secretary of the Interior, and are as follows, to wit:

4576, 1895. F. L. C. V. B. G. C. R. R. W. H.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *August* 9, 1895.

JOEL B. MYERS ET AL.
vs.
HEIRS OF LOUIS BELL. } Certiorari.

The Commissioner of the General Land Office.

SIR: Your office letter "G," of June 14th, 1895, transmits the petition of Joel B. Myers, Philander W. Knapp, E. D. Hewett and Stephen R. Crews, asking that the proceedings in the case of said petitioners *vs.* heirs of Louis Bell, involving lot 8, section 24, township 29 south, range 18 east, Gainesville, Florida, be suspended and the case transmitted to this department for action, etc.

The land in controversy is a portion of the abandoned Fort Brooke military reservation, and was the subject of a decision by the department, July 24th, 1894 (19 L. D., 48), in the case of Mather *et al. vs.* Hackley's Heirs (on review). Referring to the claim of the heirs of Bell to the lot in question, said department decision reads as follows:

On the 22nd of March, 1883, the day on which the lands
49 included in the Fort Brooke reservation were opened to entry, Louis Bell was residing upon that subdivision known as lot No. 8, section 24, township 29 south, range 18 east, intending to make the same his permanent home. He was qualified and sought to assert his settlement rights by an application to file prior to the order in which the local officers were directed to allow no entries upon said lands.

The claim of the heirs of Bell might properly be rejected upon the technical ground that the land in controversy was, at that time, included in that homestead entry of Carew, but inasmuch as said homestead claim was subsequently limited so as to exclude the lot or subdivision upon which Bell resides, and inasmuch as there is no other claimant to said legal subdivision who has a superior right to Bell, and for the further reason that his good faith calls for the

exercise of the supervisory power of the department, the same will be upheld, but limited to said subdivision.

Again the decision reads, "It will be observed that I have recognized the settlement rights of Bell and others," etc.

With this petition is also transmitted a copy of your office decision of May 1, 1895, from which it appears that in pursuance of said departmental decision, Eliza A. Bell, one of the heirs, submitted final proof (December 11, 1894) before the clerk of the circuit court for Hillsborough county, Florida. The petitioners herein appeared and protested against the acceptance of the proof, on the ground that the same was not made within the statutory period; that the law had not been complied with in the matters of residence, improvement and cultivation; that the settlement was made for speculative purposes, and, finally, that protestants had been holding portions of said lot adversely to Bell, from one-half to five years each, and that a part of the tract has been used and occupied for five
50 years for purposes of trade and business, and is desirable only for subdivision into building sites.

The register and receiver hold that the questions raised by the protest were *res judicata* and no valid adverse claim to the lands exists, and therefore, recommended the dismissal of the protests and the allowance of the final proof.

Your office found that portions of lot 8 were occupied by protestants, but not with the consent of Louis Bell, or his heirs, and that this occupancy was subsequent to Bell's settlement; that the lot is, worth at least $1,000 per acre for subdivisions into building sites and the improvements placed thereon amount to from three hundred to five hundred dollars. Your office also held that the rights of the heirs of Bell to the lot and the question raised as to the value of the land for trade and business purposes had been settled by this department in the decision quoted, and were therefore *res judicata;* that the final proof shows satisfactory compliance with the preemption law; that the protestants show no interest present or prospective, in the land in controversy, and have no right of appeal, citing Cyr. *et al. vs.* Fogarty, 13 L. D., 673, and Susie B. Moore *et al.*, 17 L. D., 298. Your office accordingly dismissed the appeal, and further held that "no appeal from this decision will be entertained," but advised them of their rights under practice rules 83, 84 and 85.

No appeal was taken from your office decision, for the manifest reasons that protestants were advised that the same would not be entertained. As a rule, a petition for certiorari will not be entertained, if the applicant has not sought relief by appeal. Smith *vs.* Noble, 11 L. D., 558. But where, as in this case, your office erroneously denies the right of appeal before the attempt to exercise that right has been made (Sanders *vs.* N. P. R. R. Co., 15 L. D., 187) the fact that no appeal has been taken will not, of itself, be allowed to debar the writ prayed for.

51 The findings of your office to the effect that Bell and his heirs were the prior settlers on the lot, and that the protestants occupied the same, without the consent of Bell or his heirs, are not denied in the petition. Petitioners fail to state what interest

they have in the land other than that they occupy the same. They fail to state in what way they would be benefited should your office decision be reversed. Indeed, if the matters set up in the petition are true, namely, "that a part of said tract has been used and occupied for five years or more for trade and business," the petitioners could not enter the land, or obtain any rights thereto, except under the town-site laws, and no application of that kind is before me.

Upon their own showing, therefore, it is seen that applicants are not directly claiming any rights to the land under any public lands laws, and their statements preclude them from asserting, as individuals, any rights hereafter. Without showing some such rights, either present or prospective, or indicating in some way how they may become legally invested with such rights, they are not in a position to have your office decision reviewed under the writ prayed for.

Again the petition fails to state in what way petitioners have been injured by the action heretofore taken in the case, and under such circumstances a writ of certiorari will not issue. Jhilson P. Cummins, 20 L. D., 130.

The petition is denied.

The papers are herewith returned.

Very respectfully, WM. H. SIMMS,
Acting Secretary.

52 W. L. 23, 35, 436, 437, 438, 439.

J. J. H. G. B. G. S. V. P.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *April 7th*, 1896.

FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY
vs.
HEIRS OF LEWIS J. BELL, Deceased.

To the Commissioner of the General Land Office.

SIR: The Florida Central and Peninsular Railroad Company has appealed from your office decision of Nov. 4th, 1895, holding that a reservation of right of way should not be inserted in certain patents to be issued to homestead and pre-emption claimants for lands within the boundaries of what was the Fort Brooks military reservation, in the Gainesville land district, Florida, over which said company has a line of constructed road.

By department decision of July 24th, 1894, in the case of Mather *et al. vs.* Hackley's Heirs (on review, 19 L. D., 48), these lands were awarded to the parties in interest as follows:

To the heirs of Lewis Bell, deceased, lot 8, sec. 24, township 29, south 18 east.

To the widow of Edward T. Gary, deceased, lots 9 (and 10), same section, township and range.

To Frank Jones, lot 16, section 18, same township and range.

Martha Stillings (now Turner), widow and heir of Andrew
53 Stillings (deceased), lot 12, sec. 19, same township and range.

To Julius Cæsar lot 13, sec. 19, same township and range.

The history of these lands pertinent to the issue now presented is, briefly, as follows:

In March, 1892, that portion of the Fort Brooks reservation in which the lands were situated, was occupied under instructions from the War Department, by United States troops in the cantonment, and was so reserved until December, 1830, when it was formerly reserved by executive order in which its limits were fixed at sixteen miles square. On January 4, 1883, they were relinquished by the Secretary of War, and restored to the public domain. The respective rights of the defendants in interest, as fixed by departmental decision aforesaid were initiated by homestead and pre-emption filings or applications to file pre-emption declaratory statements, as of the following dates:

The heirs of Lewis Bell by declaratory statements of said Bell, now deceased, filed March 30th, 1883.

Lizzie W. Carew, widow of E. S. Carew, by the homestead entry of said Carew, made March 22, 1883.

Frank Jones, by application to file declaratory statements on April 5th, 1883. Martha Stillings, widow and heir of Andrew Stillings, deceased, by application of the said Stillings to file declaratory statement, on April 25th, 1883. Julius Cæsar by application to file declaratory statement on April 23rd, 1883.

The grant to the Florida Central and Peninsular Railroad Company was made by act of Congress May 17th, 1886, (11 Stat., 15). The company filed its map of definite location on December 14, 1860, but it was not improved until January 28, 1881, for
54 reasons not necessary to consider, the railroad company being without blame, and therefore lost no rights by the long delay.

The act of May 17th, 1856, (*supra*) granted to said company every alternate section of land designated by odd numbers for six sections in width on each side of said road, for several lines, among which was one "from Amelia island, on the Atlantic, to the waters of Tampa bay."

The question here involved arises under the last proviso of the granting section, and is as follows:

And provided further, that any and all lands heretofore reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of aiding in any object of internal improvements or for any other purpose whatsoever be, and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads or branch through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the President of the United States.

It appears that the road was built, but in crossing the reservation aforesaid, the line of constructed road, deflects from the line of

definite location, just how far does not appear, but it appears to have been a considerable distance conceded *in arguendo* to be more than 200 feet but within the lateral limits of the grant, if by operation of law these lines extend across the reservation. The line of definite location does not touch the lands in controversy except at a point on lot 16, where it crosses the line of constructed road at a large angle.

The appeal and answer raises a number of questions, some of which are frivolous, and some of which are *res judicata*. Stripped of all these lands there are two questions of controlling importance.

55 First. In crossing the Fort Brooke military reservation was the company authorized to deflect its line of constructed road from its line or definate location, and as subsidiary to this, could it do so where the rights had attached under the homestead and preemption laws to the lands affected thereby, after definite location and in advance of construction?

Second. If the road has a right of way over these lands, should this right be reserved in the patents to be issued to the owners of the land?

Inasmuch as an affirmative conclusion on the second question must be reached to make a consideration of the other necessary, it will be considered first.

In the case of the Pensacola and Louisville Railroad Company, 19 L. D., 386, this question was considered at length; although presented in a somewhat different aspect. The question there presented was, whether lands over which a railroad company had a grant of right of way, subject to forfeiture for failure to build its road could be patented, to claimants under the public land laws in the absence of a declaration of forfeiture of the right of way. On this question it was therein held (syllabus): "A statutory grant of a railroad right of way is a grant of an easement, and the lands over which the right of way is located may be disposed of by patent to others, subject to whatever rights the company may have in the same," and it was said in that decision: "Your office is advised to issue patents to the land affected by the Louisville and Pensacola Railroad grant reserving in general terms such rights as the company may have in the same by virtue of said grants."

To reach this conclusion it was held by necessary implication that the company was entitled to a reservation of its rights in the
56 patent. If this be true of the railroad company, where the right of way is subject to forfeiture, it is true *a fortiori* of a company who has complied with the conditions of the grant.

In the case of *Ex parte* Mary G. Arnett (20 L. D., 131) it was held that a claim reserving the right of way should not be inserted in final certificate of entry and patent for land over which a right of way has been granted, under the act of March 3rd, 1875, where it appeared that there has been a breach of conditions imposed by said act, but no reassertion of ownership by the Government. This was put upon the express ground that the *the* 4th section of said act provided that "all such lands over which such right of way shall pass

shall be disposed of subject to such right of way," that, therefore, the rights of the railroad company (if it had any) were protected by statute, and the case of the Pensacola and Louisville Railroad Company (*supra*) was in this regard distinguished.

In the case at bar there is no question of forfeiture for failure of the conditions subsequent, and the public land laws under which these patents will issue do not in terms protect the company's rights. I am, therefore, of the opinion that if the plaintiff company has a grant of right of way across said reservation on the line of its constructed road, and is not estopped from asserting that right by its own acts, the limitation asked for should be incorporated in the patents.

On the first question it is contended by the company that by operation of law the lines of the lateral limits of its grant are extended across the reservation for the purposes of a right of way, that it had a right to build its road anywhere within such limits, and that in crossing the reservation its road was built within such limits.

57 There can be little doubt as a general proposition that a railroad may deviate in construction from its line of definate location rendered necessary to avoid engineering obstacles or remedy defects in the original location, not destroying the identity of the road constructed with the one located and confined within the limits of the grant, and that the right of the company to the lands conferred by the grant will not be defeated thereby. It was so held by the Supreme Court in the case of Van Wyck *vs.* Knevals, (106 U. S., 360), and by the decision of Secretary Lamar in the Chicago, St. Paul, Minneapolis and Manitoba Railway Company (6 L. D., 209), in which the law and decisions governing this question are reviewed at length. But unless it be concluded that the lateral lines of the companies' grants are extended across the reservations in question, then an analogous application of this rule to a right of way only would confine the company to the limits of its line of definite location, the width of which, in the absence of statutory designation, would be confined to such territory as the necessities of the road require, and any further deflection would be an abandonment of its definite location, and, therefore, of its rights of way.

The cases cited are not in point on this question, and no decision has been cited by counsel which is conclusive or even persuasive of the soundness of the contention here made, nor have I been able to find an authority on the precise question here involved. There does not appear to be any good reason for extending these lateral lines. It would serve no other purpose than to secure to the company the right to change its line of constructed road a distance of six miles on either side of its line of definite location and thus practically reserve from disposition a tract of land 12 miles wide, until the company has actually constructed its line, or render uncertain the title of every man who makes entry of any of said lands.

I do not believe that Congress so intended. A right of way was

granted over this reservation on any line the company might
58 select. Until this selection was made it was the duty of the Government to take no steps that would interfere with the free exercise of this right. The selection was made in this case by filing a map of definite location.

The right granted had then been exercised and exhausted, so far as the rights of others are concerned.

In the case of Smith *vs* The Northern Pacific Railway Company, (58 Federal Reporter, 513), in which was involved the question of the right of said company to deflect its line of road from its line of definite location under a grant of right of way, by the act of July 2, 1864, (13 Stat., 217), it was held:

The fact that railroads frequently deviate from their lines of definite location, as fixed on their maps, is no ground for inferring that Congress intended that the right of way should follow the constructed road, and not the line fixed on the map, for the act, while providing for such deviation by giving the company the right of eminent domain, by its other provisions indicates a purpose to have the railroad actually constructed on the line fixed by the map and to limit the right of way granted to the 200 feet on each side of that line.

It is contended by counsel for the company that this case is in direct conflict of the decision of the Supreme Court in the case of Railroad Company *vs.* Baldwin, (103 U. S., 426), and should not, therefore, be relied on.

I do not so understand the Baldwin case. At the date of the grant to the plaintiff company in that case, the land in controversy was vacant and unoccupied land of the United States. Baldwin acquired whatever rights *be* possessed two years prior to definite location. The company contended that Baldwin took the land
59 subject to the right of way; Baldwin contended that the grant to the right of way took effect only from the date at which the company filed its map designating the route, with the Secretary of the Interior.

The court said:

The act of Congress of July 23rd, 1866, makes two distinct grants; one of lands to the State of Kansas for the benefit of the St. Joseph and Denver City Railroad Company in the construction of a railroad from Elmwood in that State to its junction with the Union Pacific via Maryville; the other of a right of way directly to the company itself.

* * * * * * *

But the grant of the right of way by the 6th section contains no reservations or exceptions. It is a present absolute grant, subject to no conditions, except those necessarily implied, such as that the road shall be constructed and used for the purposes designated. Nor is there anything in the policy of the Government with respect to the public lands which would call for any qualification of the terms.

* * * * * * *

The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company would be compelled to purchase its rights over any section that might be occupied in advance of its location very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement, or reservation, other lands are given, but for the lost of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route.

The uncertainty as to the ultimate location of the line of
60 road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from the circumstance it is designated. Had a similar qualification upon the absolute grant of the right of way been intended it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists.

We see no reason, therefore, for not giving to the words of the present grant, with respect to the right of way, the same construction that we should be compelled to give, according to our repeated decisions, to the grant of lands, had no limitation been expressed.

We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question took the same subject to the right of way conferred by it for the proposed road.

It is evident tha t the court has under consideration a very different case from the one here presented. There was no deflection of line from the one here presented. There was no deflection of line from definite location. The road was actually constructed on the line selected by the company and approved by the department. The case does not hold anything, except that such a grant "is absolute and *in presenti* and a party subsequently acquiring a parcel of such lands takes it subject" to the right of way.

The case at bar is different in two important particulars. The homestead and pre-emption claimants herein do not seek to acquire title to lands over which a railroad company has selected its right of way by map of definite location, nor did the company build on its line of definite location. That the grants of right of way of lands in aid of the construction of plaintiff company's road were grants *in presenti*, that those grants were afloat until the line of the road was definitely fixed, and that then the selection of
61 the lands and the right of way was made thereby, and the right to lands and easements thus selected vested in the company as of the grant, are propositions well settled. See Railroad Company *vs.* Dunmeyer, 113 U. S.; St. Paul & Pacific Railroad Company, 139 U. S. and cases cited. But these principles do not sustain the contention of the plaintiff company herein. The grant of the right of way to the Florida Central & Peninsular railroad across the Fort Brooke reservation was a grant *in presenti* and attached on definite location as of the date of the grant, but it did not attach to the whole reservation. The map of definite location was a designation of the lands selected for the purposes of the right of way and the company's right attached to these lands as of the date

of the grant and by this act all other lands within the reservation were released from the company's claim.

If the Government were the only party in interest the same cogent reasons would not exist for invoking a strict interpretation of the law inasmuch as it would make no difference to the Government at what point the railroad crossed the reservation, but I am of the opinion that the company has no legal right to materially deflect its road from its line of definite location, and where adverse rights have attached to the lands affected thereby, the Land Department will not embarass the remedy of the legal title-holders of such lands against the company in the courts by making such reservations of rights of way in the patents to be issued to the owners of the land.

Your office decision is affirmed.

The papers in the case are herewith returned.

Very respectfully, JOHN M. REYNOLDS,
Acting Secretary.

62 The endorsements on the back thereof are as follows: B. Bell *et al. vs.* F. C. & P. R. R. Co. and Standard Oil Co. Portions read in evidence before the circuit court of the United States. Filed 11th day of March, A. D. 1897. E. O. Locke, clerk, by H. L. Crane, deputy clerk.

J. J. P. A. M. E. H. H. M. C. M. M.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Dec.* 18*th*, 1896.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed papers are true copies of the originals as they appear of record in this department.

In testimony whereof I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

D. R. FRANCIS, [SEAL.]
Secretary of the Interior.

45, 1895
E. B. F. E. M. R. E. W.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *July* 24, 1894.

MATHER ET AL. *vs.* THE HACKLEY HEIRS. } Involving Fort Brooke Military Reservation, Gainesville Land District, Florida.

63 The Commissioner of the General Land Office.

SIR: The various parties at interest, to wit: Daniel Mather, the City of Tampa, the Heirs of Louis Bell, deceased; W. B. Henderson, Lizzie W. Carew, Julius Ceasar, Frank Jones, E. B. Chamberlain

and Martha Lewis, alias Martha Stillings and the Hackley Heirs, have, by their attorneys, filed motions for review of departmental decisions in the case of Mather *et al. vs.* The Hackley Heirs (15 L. D., 437).

Louis Bell filed declaratory statement on March 30, 1883, and died on the reservation in November, 1885.

Daniel Mather offered to file declaratory statement April 14th, 1883.

Frank Jones applied to file declaratory statement on April 5th, 1883.

Edward S. Carew made homestead entry on March 22, 1883, covering the whole of the reservation; Mrs. Carew, his widow, subsequently limited her claim to lots 9 and 10, section 24, township 29 south, range 18 east, amounting to 35.70 acres.

Julius Cæsar applied to file declaratory statement on the 23d of April, 1883.

Enoch B. Chamberlain made homestead application on April 22d, 1884.

Andrew Stillings, husband of Martha Stillings, applied to file declaratory statement on April 25, 1883.

W. B. Henderson applied on the 27th day of November, 1883, to locate lot No. 8 and lot No. 9, section 24, township 29 south, range 18 east, containing 36.87 acres, in satisfaction of Wm. Girard's special certificate No. 2, subdivision No. 11, issued under the act of Congress, approved on the 10th of February, 1855, for the relief of the heirs of Joseph Girard. The claim of the Hackley heirs
64 is based upon the provisions of the act of April 22d, 1826 (4 Statute-, 154), as will be hereinafter explained.

A number of these motions for review were filed too late, but in the exercise of that supervisory power vested in the Secretary of the Interior, all of the cases will be considered upon their merits.

The decision under review deals with the legal status of the Fort Brooke military reservation of Florida, which during its existence embraced the land in controversy.

Said lands are therein held subject to disposition in accordance with the provisions of the act of July 5th, 1884 (23 Statute-, 103), the first section of which provides as follows:

That whenever in the opinion of the President of the United States, the lands, or any portion of them, included within the limits of any military reservation, heretofore or hereafter declared, have become or shall become useless for military purposes, he shall cause the same, or so much thereof as he shall designate, to be placed under the control of the Secretary of the Interior for disposition as hereinafter provided, and shall cause to be filed with the Secretary of the Interior a notice thereof.

It will be noticed that by the terms of the act itself, as viewed in the light of the ordinary rules of construction, it is limited in its application to military reservations that were in existence at the date of its passage, or that should be thereafter created.

The President therein is empowered to place under the control of

the Secretary of the Interior, such lands as "have become or shall become useless for military purposes."

But the land formerly embodied in the Fort Brooke military reservation had been on January 4, 1883, relinquished and
65 transferred by the Secretary of War to the Interior Department and thus restored to the public domain before the passage of said act; therefore, there can be no reason why the President should consider their value for military purposes in the sense contemplated by said act.

The scheme contemplated by the statute was the restorations of useless reservations. At that time the land in controversy did not belong to any reservation. I am of the opinion, therefore, that the act of 1884 has no application in the disposition of the lands belonging to said reservation.

The first section of the act of April 22d, 1826, *supra* upon the provisions of which the Hackley heirs base their claim, provided:

That every person, or the legal representative of any person, who being either the head of a family or twenty-one years of age, did, on or before the 21st day of January, in the year one thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situated in the Territory of Florida, which tract is not rightfully claimed by any other persons, and who shall not have removed from the said Territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, restrictions, conditions, provisions and regulations, in every respect, as are directed by the act entitled: "An act giving the right of pre-emption, in the purchase of lands, to certain settlers in the Illinois Territory," passed February 5th, one thousand eight hundred and thirteen; *Provided*, that no person shall be entitled to the provisions of this action, who claims any tract of land in said Territory, by virtue of a confirmation of the commissioners or by virtue of any act of Congress.

It appears that R. J. Hackley entered upon the land claimed
66 by his heirs, included in said reservation, in 1823, and that said Hackley never relinquished his claim to said land, and that he made settlement in good faith, so far as the record discloses, and for the purpose of securing a home, which purpose, his heirs contend, is superior to any that were made subsequent to the abandonment of said reservation.

It further appears that in March, 1824, in obedience to instructions from the War Department, that portion of said reservation now in controversy was occupied by the United States troops in cantonment, and was so used until December, 1830, when it was formally reserved by executive order, in which its limits were fixed at sixteen miles square. Subsequent to this said lands were in a state of reservation the greater portion of the time until January 4, 1883, when they were relinquished and finally restored to the public domain.

R. J. Hackley was ejected from the land by the military in 1824.

At that time the provisions of the act of March 3, 1807 (2 Stat., 445), were in force in the State of Florida, having been re-enacted

in the act providing for the establishment of a territorial government in said State on March 30, 1822 (3 Stat., 654). The first section of the act of March 30, 1807, *supra*, provided:

That if any person or persons shall, after the passing of this act, take possession of or make settlement on any lands ceded or secured to the United States, by any treaty made with a foreign nation, or by a cession from any State to the United States, which lands shall not have been previously sold, ceded or leased by the United States, of the claim to which lands, by such person or persons, shall not have been previously recognized and confirmed by the United
67 States; or if any person or persons shall cause such lands to be thus occupied, taken possession of or settled; or shall survey, or attempt to survey, or cause to be surveyed, any such lands, or designate any bounderies thereon, by marking trees or otherwise, until thereto duly authorized by law, such offender or offenders shall forfeit all of his or her right, title and claim, if any he hath or they have, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, which he or they shall have taken possession of or settled, or cause to be occupied, taken possession of or settled, or which he or they shall have surveyed or attempted to survey, or cause to be surveyed, or the boundaries thereof he or they shall have designated, or cause to be designated, by marking trees or otherwise.

When H. J. Hackley was ejected from said land by the military in 1824, he could not, in view of the provisions of the act above quoted, have initiated any claim to said lands by virtue of his settlement.

The heirs of Hackley, however, relying upon the provisions of the above-quoted act of 1826, contend that the cantonment which existed from 1824 to 1830 was not such a reservation as will defeat the pre-emption rights of said heirs under the act of 1826. His position is that "when the act of 1826 confirmed in all settlers upon whose lands prior to January 1, 1825, the right to purchase the lands whereon they resided, etc., no mere occupancy by the military, nor even constructive reservation of an inferior order or dignity could defeat the operation of such an act of Congress."

In support of his position counsel cites the case of Johnson *vs.* The United States, 2d Court of Claims, 391. Johnson's claim was based upon what is known as the "Oregon donative act," and, as required by that act, he had settled upon and occupied the land in controversy for four years continuously, with nothing left to
68 be done to secure patent but to make proof of the same, when the tract was forcibly taken and occupied by troops of the United States, "without the knowledge of the President, the Secretary of War, or any high officer of the Government." In that case the court held that such an occupation was not a reservation within the meaning of the Oregon donative act, and could not effect the rights of the plaintiff.

In the case at bar, however, the facts are very different.

The tract known as the Fort Brooke military reservation was occupied under the direction of the Secretary of War, two years be-

fore the passage of the act upon which the claim of the Hackley heirs is predicated.

In further support of his views counsel recites the history of Camp Stambaug, in Wyoming Territory.

It appears that in 1870 the Secretary of War established said military post, which was laid off as a reservation and included all the territory within one mile of the flagstaff erected at the post. On 1861 the Secretary of War notified the Secretary of the Interior that said post, being no longer needed for military purposes, had been discontinued. In said communication he expressed the opinion that, inasmuch as there had been no formal reservation of the lands included therein by the President, the same might be restored to the public domain, as other lands, without the consent of Congress.

The Secretary of the Interior concurred in this opinion, and said lands were treated as having been restored to the public domain by the act of abandonment and the subsequent notification on the part of the Secretary of War.

I am unable to see wherein the correspondence above re-
69 ferred to sustains the contention of counsel, for while it may be true that a military post, established by the Secretary of War may be restored to the public domain with less formality than if it had been reserved by a formal order of the President, still the Secretary of War had the authority to establish Cantonment Brooke, and by virtue of such establishment the lands upon which it was located were not subject to entry so long as unrelinquished.

Where a military post or cantonment is established upon the public domain, whether the same be for temporary purposes, or permanent occupation by the military, if it be done by competent authority, the lands included therein are not subject to entry until properly restored to the public domain.

If the Secretary of War has the authority to establish a military post, it follows that during the time that the lands included therein are occupied for military purposes, they are not subject to be disposed of under the pre-emption laws. In the case of Wilcox *vs.* Jackson (13 Pet., 498), it is held as follows:

The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence, we consider the act of the War Department in requiring this reservation to be made, as being in legal contemplation of the act of the President; and consequently that the reservation thus made, in legal effect, a reservation made by order of the President, within the terms of the act of Congress.

It is further held in said case, as follows:

But we go further and say that, whensoever a tract of land shall have once been legally appropriated to any purpose, from
70 that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law

or proclamation, or sale, could be construed to embrace it or to operate upon it, although no reservation were made of it.

The counsel for the Hackley heirs, further contend that the cantonment did not cover the whole of the one hundred and sixty acres to which the Hackleys' claim attached, and that the appropriation by the military did not, therefore, extinguish his claim to that portion which lay outside of the limits of the cantonment.

Counsel insists that inasmuch as the buildings erected for the accommodation of Cantonment Brooke were located upon what is now known as lot 9, of said tract, the said encampment was therefore limited to the spot upon which said buildings were erected.

This is untenable for the reason that it was necessary for the convenience of the military to operate a considerable area of the public domain for wood, water and other purposes, and the fact that Hackley was ejected from his entire claim was itself an appropriation thereof.

In accordance with the view thereinbefore expressed, therefore, the claim of the Hackley heirs is denied.

The provisions of the act just mentioned have no application in adjusting any claim made to the land in controversy, for the reason that said lands had been appropriated and occupied by troops in cantonment, for two years, at the date of its passage.

It seems to me that the proper disposition of said lands is governed by the provisions contained in the act of August 18, 1856 (11 Stat., 87) which provides that all lands heretofore reserved for military purposes in the State of Florida, etc., "shall be dis-
71 posed of and sold in the same manner and under the same regulations as other public lands of the United States."

For the purposes of the present inquiry, it is not necessary to go into the details of the history of the Fort Brooke military reservation until the time of its final restoration to the public domain in January, 1883.

On March 22nd, 1883, the local officers at Gainesville, Florida, received an approved diagram of the subdivision into seven lots of land formerly embraced in said reservation. On April 2nd thereafter said officers were directed to allow no entries upon said land within said reservation. In the interval which elapsed between the 22nd of March and the 2nd of April, 1883, said lands were open to entry unless it was incumbent upon the Commissioner to place the lands upon the market in the manner provided in the act of 1846, which contains the following provision in the fifth section thereof (section 2655, R. S.):

It shall and may be lawful for the Commissioner of the General Land Office to order into market, after due notice, without the formality and expense of a proclamation of the President, all land of the second class, though heretofore unproclaimed and unoffered, and such other isolated or disconnected tracts or parcels or unoffered lands which, in his judgment, it would be proper to expose to sale in like manner, provided, that public notices of at least thirty days shall be given by the land officers of the district in which such

lands may be situated, pursuant to the direction of the Commissioner aforesaid (9 Stat., 51).

It will be observed that the foregoing provision is discretionary with the Commissioner, inasmuch as it is a matter left to his judgment. Beside, it was the practice of the department, prior to October, 1885, to recognize the validity of homestead and pre-
72 emption claims made immediately upon the filing of township plats; and in cases, also where lands have been restored to the public domain by acts of forfeiture, homestead and pre-emption claims have been allowed to take effect immediately after the passage of such acts.

On the 2nd of October, 1885, Commissioner Sparks, with the approval of Secretary Lamar, issued instructions to registers and receivers (4 L. D., 202), which provide as follows:

Hereafter, when approved plat of the survey of any township is transmitted to you by the surveyor general, you will not regard such plat as officially received at and filed in your office until the following regulations have been complied with:

First, you will forthwith post a notice in a conspicuous place in your office, specifying the township that has been surveyed, and stating that the plat of the survey will be filed in your office on a day to be fixed by you and named in the notice, which shall not be less than thirty days from the date of such notice, and that on and after such day you will be prepared to receive applications for the entry of lands in such township, etc.

It seems that the foregoing instructions were issued for the reason that prior to said date it has been the practice of the department to recognize the validity of filings and entry immediately after the plat of survey made by the surveyor general was received at the local office. If, before that time, the reception of the plat of survey sent by the surveyor general to the local land officers was regarded as a sufficient reason for the acceptance of filings and entries, much more would *be* the reception of a plat of survey sent to the local office by the Commissioner of the General Land Office be regarded as such.

73 In the case at bar the plat of survey sent by the Commissioner of the General Land Office was received at the local office on the 22d day of March, 1883.

It may be that the land included within the Fort Brook military reservation is an isolated and disconnected tract within the meaning of the act of 1846, but when such a tract belongs to the public domain, it is nevertheless, open to settlement under the public land laws at all times, before the Commissioner proceeds with the disposition of the same under the provisions of said act. If, therefore, a qualified entryman applies to make a homestead entry on such a tract, while it belongs to the public domain and before any steps have been taken by the Commissioner to dispose of the same under the authority given him by said act, his application should be allowed. After such an entry has been allowed and such a tract has been in that manner segregated, the Commissioner has no authority to dispose of it in any other manner.

The discretionary power vested in the Commissioner by said act of 1846, must be exercised before the segregation of the land. After an entry has been allowed, the rights of the entryman become vested and the provisions of the above-mentioned act, must be construed in harmony with them.

In volume 2, L. D., 606, Secretary Teller, in treating of the question relating to the Fort Brook military reservation, comes to the conclusion that the entry and filings made thereon, after the 22d of March, 1883, were premature.

It is held in said case that:

The act of 1856 and section 2364 must be read together. Together they make the general law for the disposition by you
74 of these Florida military reservations, and claimants are charged with notice of the whole law upon the subject.

Section 2364 of the Revised Statutes reads as follows:

Whenever any reservation of public lands is brought into market, the Commissioner of the General Land Office shall fix a minimum price not less than one dollar and twenty-five cents per acre, below which such lands shall not be disposed of.

It will be observed that above-recited act is limited in its terms to reservation "brought into market."

The act of 1856, provides that the military reservations in Florida, after being placed under the control of the General Land Office, are "to be disposed of and sold in the same manner and under the same regulations as other public lands in the United States."

Now, "public lands in the United States" are disposed of in various ways. On July 2, 1884, the date of the passage of the act embodied in section 2364, public lands were disposed of under the homestead and pre-emption laws, and, when the Commissioner so directed, certain lands were brought into market and sold to the highest bidder.

Said section being limited by its own terms to the manner of disposition last mentioned, has no application except in those cases where the Commissioner in the exercise of his discretion under the law, had brought lands into the market to be sold at public auction. This construction is obvious unless it be held that the act of 1856 contemplates that no military reservation in Florida shall be disposed of in any other way than by public sale. I am of the opinion that the principle of construction employed in the decision above mentioned, is untenable.

Under the authority vested in the Commissioner of the
75 General Land Office by the acts of 1846 and 1856, and by section 2364 of the Revised Statutes, he might have brought into market, and disposed of same at public auction, the lands included in the Fort Brooke military reservation; but he was not compelled to do so, and up to this time has made no effort to have the same disposed of in that manner. It was legitimate, also, to dispose of said reservation under the homestead and pre-emption laws, and when the same was restored to the public domain, as hereinbefore mentioned, it was subject to entry under said laws. Section 2364 of the Revised Statutes has no application to the dis-

position of the same unless the Commissioner of the General Land Office, in the exercise of his discretion, has seen proper to bring said reservation into market.

The Fort Brooke military reservation at one time included all the lands within sixteen miles square, and in 1883 it had been reduced by former relinquishment to less than one hundred and fifty acres. Almost the whole of said original reservation had been disposed of under the homestead and pre-emption laws. The fact that the land in controversy had become very valuable is no reason for the introduction of a different rule from that which has been uniformly observed by the department in the disposition of other reservations prior to the act of 1884.

I am of the opinion, therefore, that the lands in controversy were open to entry from March 22nd to April 2nd, 1883, the day on which the local officers were instructed to allow no entries on the same.

The claims of all the other parties at interest are based upon applications made on and subsequent to the 22nd day of March, 1883. The homestead entry of E. S. Carew, the husband of the claimant, Mrs. L. W. Carew, was the first application made
76 after the lands were restored to the public domain, and, unless there was some sufficient legal reason for its rejection, should have been allowed.

In the departmental decision complained of, it is held as follows:

The finding of the local officers and your office, that the entry of Carew and the settlement of Mather were not made in good faith, is supported by the evidence, and their claims were properly rejected.

I have searched the record, with a view to ascertaining, if possible, the disclosures therein that go to impeach the good faith of E. S. Carew, and I have failed to find any admissible or competent evidence that justifies the conclusion reached in said decision.

The rejection of the claim of Mrs. L. W. Carew seems to have been predicated upon the testimony of J. T. Lesley, who appeared in behalf of the city of Tampa.

Lesley testified that Senator Call notified him that he (the Senator) had instructed E. S. Carew to make pre-emption or homestead upon the reservation, and had instructed one Carlisle to make such entry on the same, in order to secure it for the people of Tampa. He also informed witness that he had instructed Dr. Carew to draw upon him (Call) for the money. This Carew did. Witness paid the draft drawn by Carew on Senator Call. A few days afterward Carew informed witness that he had received a telegram from the Senator to make homestead entry upon said reservation and to draw upon him (Call) for the money. Carew told witness that he would turn over the homestead or pre-emption to the city of Tampa, or would continue the same, or would prove it up. Witness explained to Carew why it was that he was requested to make the homestead, which was to forestall speculation, until Congress could pass
77 an act donating it to the city of Tampa. Witness and others thought best to have the reservation homesteaded, and to let

the town have what it wanted. Witness explained to Carew, who was interested in the scheme, what amount witness thought the city of Tampa would be satisfied with. Witness, after consultation with parties interested and members of the town council, thought it best that, if Dr. Carew would agree to carry out in good faith such an arrangement, and divide up the reservation as per agreement, he (Carew) should continue on the place. Witness told Dr. Carew that, and Carew acquiesced in the arrangement.

Carew, witness and others intended, at the end of six months, to commute this land, put it under this commutation act and divide it out among the parties interested, as per agreement. Witness afterwards called upon Carew to have an interview about the matter, and, to his astonishment, Carew refused to do anything.

Carew then said that he was the only person who had any rights, and that he intended to retain them. Witness answered that while Carew might defeat the town of Tampa, and the "balance of us," from getting this land, or any part of it, witness thought "we would be able to do the same with him," having no disposition to do anything of the kind, but simply asking that the agreement thus made be carried out in good faith.

Carew refused to do so. Carew remained in the house secured for him up to the time of his death; his widow has lived in the same house ever since. Witness had no controversy or correspondence with Carew on or before the 22nd day of March, 1883, relative to the reservation or homestead thereon. According to the agreement, witness had with Carew, the reservation was to be divided into six parts: Carew to have one; the town of Tampa one; W. B. Henderson, one; S. M. Sparkman, one; J. A. Henderson, one,
78 and witness one. Tampa was to make its selection, and the balance to be divided equally among the other five. Parties interested were to pay all the expenses and Dr. Carew was to comply with the homestead law in regard to residence and cultivation.

After the failure to secure the land in 1883 there was a script entry made upon it by W. B. Henderson, and by him the same proposition was made to the city of Tampa. Witness owned an interest in this script after this time; witness' son now owns said interest.

Carew died in 1886.

It will be observed that at the time of the trial Carew had been dead several years, and that witness was an interested party in the transaction in regard to which he testified.

In the statute of Florida, chap. 101, sec. 24, it is provided as follows:

No person offered as a witness in any court or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceedings, or because he is a party thereto; provided, however, that no party to such action or proceedings, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any transaction, or communication

between such witness and the person at the time of such examination deceased, insane or lunatic, against the executor, administrator, heir-at-law, next of kin, assignee or committee of such insane person or lunatic, etc.

Besides, it will be observed that the witness testified that he and Carew were parties to a scheme which involved perjury on
79 the part of Dr. Carew and subornation of perjury on the part of the witness himself. When Dr. Carew made his homestead entry he was compelled to swear that the same was done *not* for the benefit of any other *person, persons, or corporation.* He was also compelled to swear that he was "not acting as agent for any person, corporation or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered or any part thereof, etc."

The scheme testified to by the witness was utterly inconsistent with the affidavit which had to accompany the homestead application of Carew, and the moral culpability implied on the part of a witness who, according to his own showing, testified in a revengeful spirit, because the other party to such a contract refused to carry out the same, is sufficient to discredit his testimony in the absence of any other legal reason.

In my opinion the testimony of J. T. Lesley, in so far as it goes to impeach the good faith of E. S. Carew, is inadmissible from a legal standpoint, and harmless because of its other infirmities. There being no other obstacle in the way of the claim of Mrs. Carew, I am of the opinion that it should be allowed.

The legislature of Florida in the year 1889, merged the towns of Tampa and North Tampa into one corporation and extended the limits of the city so as to include the reduced military reservation, and upon this legislative enactment the city of Tampa bases its claim to said reservation to be used as a public park and for other purposes.

The testimony failing to show that any considerable portion of the same was used and occupied for trade and business, the
80 said claim was properly rejected in the opinion under review.

To avoid confusion I note that by the diagram approved by your office in 1883, Fort Brooke was divided into seven lots, numbered 8, 9, 10, 12, 13, 14 and 16. According to the public survey, lots 8, 9 and 10 fall within section 24, township 29 S., R. 18 east; lots numbered 12, 13 and 14 fall in section 19, township 29 S., R. 19 east, and lot numbered 16 falls within section 18, township 29 S., R. 19 east, Gainesville, Florida.

On the 22nd day of March, 1883, the day on which the lands included in the Fort Brooke reservation were opened to entry, Louis Bell was residing upon that subdivision known as lot No. 8, section 24, township 29 S., R. 18 east, intending to make the same his permanent home. He was qualified and sought to assert his settlement rights by an application to file, prior to the order in which the local officers were directed to allow no entries upon said lands. The claim of the heirs of Bell might properly be rejected upon the technical ground that the land in controversy was, at that time, in-

cluded in the homestead entry of Carew, but inasmuch as said homestead claim was subsequently limited so as to exclude the lot or subdivision upon which Bell resides, and inasmuch as there is no other claimant to said legal subdivision, who has a superior right to Bell, and for the further reason that his good faith calls for the exercise of the supervisory power of the department, the same will be upheld, but limited to said subdivision.

The telegram sent from your office on the 2nd of April, 1883, to the local officers directing them to allow no entries upon lands within said reservation, was doubtless made upon the idea
81 that said lands could not be disposed of otherwise than by being brought into market and sold at public auction.

There being now no reason why said order should remain longer in force, especially in view of the fact that the claims of Carew and Bell, both of which were of record, or offered prior to the date of said order, include the most valuable lands in the reservation aforesaid.

The claims of Julius Cæsar to lot 13, and of Martha Stillings, wife and heir of Andrew Stillings, deceased, to lot No. 12, of section 19, township 29, south, range 19, east, and that of Frank Jones to lot No. 16, section 18, township 29, south, range 19, east, are in the same condition as that of Louis Bell, with the exception that said claims were asserted subsequent to the date of the order from your office directing that no entries be allowed upon the lands of said reservation.

The settlement rights of Cæsar, Stillings and Jones had attached prior to the date of said order, and were simply held in abeyance by it. You will, therefore, direct that their claims be allowed to the lots, or subdivisions, upon which they respectively resided, should there be no intervening reason in either case for a different disposition of said lots.

The claim of W. B. Henderson to locate Gerard scrip on lots 8 and 9, section 24, township 29, south, range 18, east, must be denied on account of its conflict with the prior rights of Louis Bell and Mrs. Carew.

The declaratory statement of Daniel Mather was properly rejected in the light of the record which discloses the fact that he never contemplated making his permanent home upon any land inside the Fort Brooke reservation, and that he abandoned his claim in 1885.

82 The remaining lot in said reservation, to wit: lot No. 14, section 19, township 29, south, range 19, east, was settled upon by E. B. Chamberlain on the 7th of July, 1883, and upon that settlement he bases his claim.

The order emanating from your office, directing the local officers to allow no entries, was no bar to initiating a settlement claim, and said order having been herein revoked, his claim will be allowed to said lot, should there be no other legal obstacles in the way of his perfecting the same.

It will be observed that I have recognized the settlement rights of Bell and others, in this case, and the question might arise

that since the settlement of Bell, for instance, was made prior to the homestead entry of Carew, and his rights thereunder were asserted by him within the time prescribed by law, and that his claim would be superior to that of Carew, whose settlement began from his entry.

A settler is defined to be "a person who intending to initiate a claim under any law of the United States for the disposition of the public lands, *does some* act connecting himself with the particular tract claimed, said act being equivalent to an announcement of such intention, and from which the public generally may have notice of his claim" (2 L. D., 628).

In the light of this definition, the record discloses no act on the part of Mr. Bell or the other claimants which connects him or any of them "with the particular tract claimed," outside of the lots, or subdivisions, upon which they respectively reside, until after the same was covered by Carew's entry.

I recognize the rulings of the department that where an entryman is claiming a quarter section of land and has made
83 settlement upon one forty-acre tract of the quarter section, which he claims, that his settlement rights will be construed to cover the whole of the technical subdivision.

This rule, however, is limited by the condition that it must appear that the entryman intended to claim the particular technical subdivision which embodies the tract upon which he has made settlement.

If it should appear, for instance, that a person has made a settlement upon one quarter of some particular section of public land, and intends to claim a portion also of some other section, then the rule above referred to does not apply.

In order to avail himself of such a claim his acts of settlement must cover the whole tract.

Now, the Fort Brooke military reservation includes portions of three separate sections of public land. A claimant, therefore, who seeks to acquire title to the whole of said reservation must show such acts of settlement as extend to the entire tract.

But it may be suggested that the legal subdivision upon which Bell resides, according to the general public survey, is the same as that upon which Carew resides, and that under a proper construction of the rule hereinbefore discussed, the settlement rights of Bell should be held to extend at least to cover the lots upon which Carew resides.

The reply is that Mr. Bell has never limited his claim to any technical quarter section of land, and the rule applies to such claimants only.

The decision under review, for the reasons hereinbefore mentioned, is set aside, and you will direct that the lands formerly in-
84 cluded within the Fort Brooke military reservation be disposed of in accordance with this opinion.

Herewith are returned the papers.

Very respectfully, H. K. SMITH, *Secretary.*

G. 4-207 A. J. P. G. McC.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December*, 1896.

I, S. W. Lamoreux, Commissioner of the General Land Office, do hereby certify that the annexed copy of letter "G," dated May 1, 1895, dismissing appeal of Joel B. Myers *et al.*, in the town-site contest case, entitled "Joel B. Myers *et al. vs.* Heirs of Louis Bell, deceased," involving lot 8, section 24, township 29 south, range 18 east, Gainesville land district, Florida, and also copy of letter "F," dated November 4, 1895, denying request of Attorney C. W. Holcomb for the Florida Central and Peninsular Railroad Company, relative to right of way of certain lands in Fort Brooke military reservation, described as lots 8, 9, section 24, township 29 south, range 18 east; lot 16, section 18, and lots 12, 13, section 19, township 29 south, range 19 east, Gainesville land district, addressed to the register and receiver at Gainesville, Florida, are true and literal exemplifications of the records of this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] S. W. LAMOREUX,
Commissioner of General Land Office.

85 Ex.

F. R. & M. J. W.

T. S. Doc. 2, case 38, page 173. G. McC.

(G.) W. H. L. DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, WASHINGTON, D. C., *May* 1, 1895. Y. P. T. W. A. W. C. V.

Address only the Commissioner of the General Land Office.

JOEL B. MYERS ET AL. *vs.* HEIRS OF LOUIS BELL, Deceased. } Involving Lot 8, Section 24, Township 29 South, Range 18 East, Gainesville, Fla.

Register and receiver, Gainesville, Fla.

GENTLEMEN: Under date of February 23, 1895, you transmitted, on appeal, the record in the above-entitled case which arose upon the protest of Myers *et al.* against the acceptance of the final proof of the heirs of Louis Bell, deceased, on pre. D. S., 569, filed March 30, 1893.

Mr. Bell filed said declaratory statement for lots 8, 9, 10, section 24, township 29 south, range 18 east; lot 16, section 18, and lots 12, 13 and 14, section 19, township 29 south, range 19 east, these tracts being a portion of the abandoned military reservation of Fort Brooke.

By decision of the Secretary of the Interior of July 24,
86 1894, (19 L. D., 48), lot 8 of said section 24 was awarded to the heirs of Louis Bell, deceased, and in pursuance of this award, Eliza A. Bell, one of said heirs, submitted final proof for the tract, December 11, 1894, before Charles Wright, clerk of the circuit court for Hillsborough county, Florida.

On that date, Joel B. Myers, Philander W. Knapp, E. D. Hewett and Stephen R. Crews protested against the acceptance of said proof on the grounds that final proof was not made within the statutory period; that each of said protestants have been holding adversely to Bell, portions of said lot 8, varying from one-half to five acres each; that Mr. Bell and his heirs have not complied with the provisions of law as to residence, improvements and cultivation; that said tract was not settled upon in good faith, but for speculative purposes; that a part of said tract has been used and occupied for five years for purposes of trade and business, and is desirable only for subdivision into building sites.

The testimony forwarded consists of the final proof on said filing; cross-examination of Miss Bell and witnesses and additional evidence introduced on the part of the protestants. The line of examination is an attempt to show the adverse occupancy by the protestants, the value of the land for the purposes of trade and business, and the limited amount of improvements on the tract in controversy.

You decided that this testimony deals with questions that are *res judicata* and no valid adverse claim to the land exists. You recommend the dismissal of the protest and the allowance of the entry for the heirs of Louis Bell.

The testimony shows the occupation of portions of lot 8 by the protestants, but not with the consent of Louis Bell or his heirs, that this occupancy was subsequent to Bell's settlement; that the
87 land is worth at least one thousand dollars per acre for subdivision into building sites; that the improvements placed on said tract by Bell and his heirs amount to from three hundred to five hundred dollars.

The questions of the right of Bell's heirs to this land and its value for purposes of trade and business have been settled by the decision of the Secretary (19 L. D., 48), and are therefore *res judicata*. The final proof shows a satisfactory compliance with the preemption law, the parties who protested against the allowance of the proof show no interest, present or prospective, in the land in controversy and have no right of appeal. See cases of Cyr *vs.* Fogarty (13 L. D., 673) and Susie B. Moore (17 L. D., 298).

The appeal is therefore dismissed, and following the opinion expressed herein, no appeal from this decision will be entertained. You will advise Smith and Peeples, attorneys for the "protestants," of their rights under rules 83, 84 and 85, Rules of Practice.

This ruling is in accordance with the decision of this office of January 16, 1895, in the case of Harper *vs.* Corporate Authorities of Grand Junction, Colorado, in which an application for certiorari was denied by the Secretary, March 11, 1895.

Should no action be taken within the time specified in rule 85, you will issue cash certificate and receipt in the name of the heirs of Louis Bell, deceased, upon proper payment, account for the same in current returns, advising this office by special letter when this has been done.

Also forward evidence of service of notice of this decision.

Very respectfully, EDW. A. BOWERS,
Acting Commissioner.

88 Ex'd.

H. D. 1895-30573.

Refer in reply to this initial.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov.* 4, 1895.

Address only the Commissioner of the General Land Office.

Register and receiver, Gainesville, Florida.

SIRS: I am in receipt of a letter of C. W. Holcomb, Esq., attorney for the Florida Central and Peninsular R. R. Co., requesting that patents issued in accordance with the honorable Secretary's decision (19 L. D., 48), as to certain lands in the Fort Brooke military reservation, Florida, should contain a reservation of right of way for the constructed road of said railroad company.

The tracts designated in said letter are said to be crossed by the line of road as constructed, and are lots 8 and 9, section 24, township 29, south; range 18 east, lot 16, section 18, and lots 12 and 13, section 19, township 29, south, range 19 east.

Under section —, act May 17, 1856, (11 Stat., 15), right of way was granted to the company across reservations through which it may be found necessary to locate the route of the road, subject to the approval of the President of the United States.

A copy of the company's map of definite location, as previously filed on December 14, 1860, was accepted by the department, January 28, 1881; and on April 24, 1890, the company's map of constructed road was filed.

89 The location of the line of definite location is entirely different, in this vicinity, from the location to the line of constructed road, as shown by these maps, the only approach of the two to each other being in lot 16 of section 18, township 29 south, range 19 east, where they cross at a large angle.

The question of right of way along a line of constructed road, which deviated greatly from the line of definate location was fully considered by the United States circuit court of appeals, in the case of Smith *vs.* Northern Pacific R. R. Co., (58 F. R., 313-318), where it was held that the company by filing the map of definite location "exhausted the right of selection given by the act of Congress and definitely and irrevocably fixed the line of this railroad, and the

limits of the right of way granted to it, as against third parties, holding under patents of the United States."

This view is in full accord with the well-established principles concerning maps of definite location as a basis for fixing the locations of land grants.

After an oral argument by the attorney, and a thorough consideration of the question, I have concluded that under the circumstances herein set forth, a reservation of right of way along the constructed road, should not be inserted in patents issued for said tracts, subject to the usual right of appeal.

It may be further observed that the records of this office do not show an approval of the right of way through this reservation by the President of the United States, as to either of the said maps.

Advise all parties in interest hereof. The company's attorney will be notified from this office.

Very respectfully, S. W. LAMOREUX,
Commissioner.

90 The endorsements on the back thereof, are as follows: Protestants claim *vs.* R. R. Co., C. Bell *et al. vs.* F. C. & P. R. R. Co. and Standard Oil Co. Read in evidence before the circuit court of the United States, southern district of Florida, by plaintiff. March 11, 1897. E. O. Locke, clerk, by H. L. Crane, deputy clerk.

By Mr. BISBEE: I next offer in evidence, if the court please, a certified copy of an affidavit of the engineer of the said defendant railroad company and of his map attached thereto, showing the location of the road, the width of its right of way, etc.

By Mr. KNIGHT: Is this map for the purpose of showing the acreage?

By Mr. BISBEE: Yes, sir.

By Mr. KNIGHT: We then object to the introduction of this map. We have no objection to the introduction of the map itself, showing the line of the location of the railroad across this land, but there is nothing on this map to indicate the width of the right of way, or the property that they have occupied. Your honor can see the map for yourself.

By Mr. BISBEE: Not only does this map state their location, but it is established by these papers; the width, right of way and acreage of the land, occupied by this defendant, for which they asked to have this patent issued, reserving their right of way to it. It is *prima facie* evidence, if the court please, though we expect
91 to follow that up by other testimony. Of course, the acreage they have excluded us from is a material point in this case. We expect to establish by this testimony and other witnesses, that they have actually occupied that and excluded us. This is a paper furnished by the defendant itself. The affidavit of the chief engineer, attached to the map, is read in evidence.

It is as follows, with the endorsements thereon:

STATE OF FLORIDA, *County of Duval,* } ss:

Blair Burwell, Jr., of Jacksonville, in said county and State, being duly sworn, deposeth and says, that he is the chief engineer of the Florida Central and Peninsular Railroad Company.

That the attached map or plat, shows between the points marked "A" and "B," the exact location of the main line of the said company's railroad, with reference to the subdivision of the lots embraced in the Fort Brooke reservation, as shown by the public surveys of said reservation, and that the line of said railroad passes through the following lots embraced in the said reservation, at the points indicated on the said map, viz: Lots Nos. 8 and 9, of section 24, in township 29 south, of range 18, east. Lot No. 16, of section 18, in township 29 south, of range 19, east, lots Nos. 12 and 13, of section 19, in township 29 south, of range 19 east.

BLAIR BURWELL, JR.,
Chief Engineer of the Florida Central and Peninsular Railroad Company.

Sworn and subscribed to before me this 17th day of December, 1894.

[SEAL.] ISAAC BRERETON,
Notary Public.

(Here follows diagram marked p. 90½.)

92 JACKSONVILLE, FLORIDA, *December 15th*, 1894.

It is hereby certified that Blair Burwell, Jr., is the chief engineer of the Florida Central and Peninsular Railroad Company, and that the line of the said railroad as indicated on the map hereto attached, between the points marked "A" and "B" is correct.

H. RIEMAN DUVAL,
President of the Florida Central and Peninsular Railroad Company.

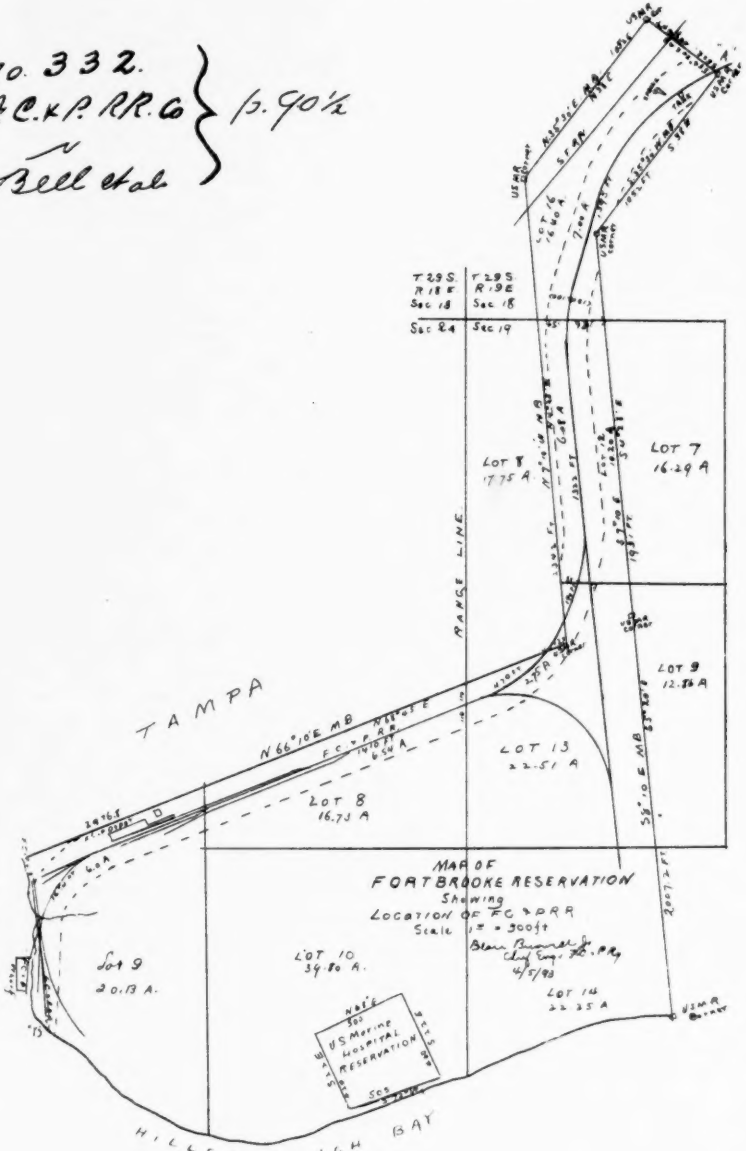
Sworn to and subscribed before me this 15th day of December, 1894.

[SEAL.] ISAAC BRERETON,
Notary Public.

By Mr. BISBEE: It is *prima facie* evidence that that is the land that they claim, the extent of their claim, and *prima facie* evidence, perhaps not very strong, that that is the amount of property they occupy. (Mr. Bisbee having read the affidavit.) It is even stronger than that. He says it actually represents the location of their road between these two points.

By Mr. KNIGHT: I have no objection in the world to the introduction of this map for the purpose of showing the line that its track occupies, across that lot, but what I object to is its being for the purpose of showing the amount of land they occupy.

no. 332.
F.C.&P.P.R.R. Co } p. 90½
v.
Bell et al



By the COURT: No further argument is necessary. The court will admit it for the purpose of showing the line that the railroad occupies.

By Mr. BISBEE: The acreage computed here is six and fifty-four-hundredths acres, that their line of railroad occupies, according to this affidavit. I think it is pretty good evidence as to the
93 amount of land that they actually occupy, between these two points, but I propose to follow that up by other testimony.

The map is introduced in evidence and filed in evidence for the purpose of showing the line that the railroad occupies, and is as follows, with the endorsements:

A. D. S. J. P.
(G.)
F. 4–207 A.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 2nd*, 1897.

I, E. F. Best, acting Commissioner of the General Land Office, hereby certify that the annexed copy of a plat (blue print) filed by the Florida Central and Peninsular Railroad Company, with its request of March 21, 1895, for recognition of the right of way over lots 8 and 9, section 24 township 29, south, range 18 east, lot 16, section 18, township 29, south, range 19 east, and lots 12 and 13, section 19, township 29, south, range 19 east, within the former Fort Brooke reservation, Florida, said lots being embraced in the claims of Julius Cæsar, *et al.*, and copy of affidavits of Blair Burwell, Jr., and that of H. Rieman Duval, are true and literal exemplifications of the said papers on file in this office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, the day and year above written.

[SEAL.] E. F. BEST,
Acting Commissioner of General Land Office.

94 By the COURT: The land in question here is lot eight.

By Mr. BISBEE: Yes, your honor. *I*t will ask your honor to reserve a positive ruling to the introduction of that map. I think I can show some authorities to show that that map is absolutely conclusive.

And the plaintiff-, to maintain the issues on their part, introduced as a witness one H. L. CRANE, who being duly sworn, testified as follows:

Q. Mr. Crane, where do you reside?
A. Tampa.
Q. How long have you resided here?
A. Thirty-five years.
Q. What official position, if any, did you hold in the year 1894?

A. County judge.
Q. What county?
A. Hillsborough county.
Q. Have you any recollection of taking proof of pre-emption claim of Louis Bell, while county judge?
A. About that time I was taking a good many proofs for pre-emption and homestead.
Q. For this reservation?
A. I do not remember whether on that reservation particularly.
Q. Do you remember Mr. Bell's case?
A. I do remember that.
Q. Do you not remember taking testimony on his pre-emption claim?
A. If there was notice published, probably I very likely took it.
95 By the COURT: You might refresh his memory. What is the purpose?
By Mr. BISBEE: For the purpose of showing that we complied with the pre-emption law.
By the COURT: You have a certificate from the land office showing that.
Answer by Mr. BISBEE: No. But I have here a clipping from the Tampa paper signed by Eliza Bell. He can testify to that.

Q. I will ask the witness to look at that and say whether or not that refreshes his memory?
A. No, sir. Those witnesses never came before me. Those witnesses, I am quite sure, never came before me.
Q. Did you take the testimony of any witnesses?
A. (Let me look at that.) If the original proof is here or a copy I could refresh my memory.

By Mr. BISBEE: Perhaps counsel will admit this, without the lady being present. I have a copy here, which I can prove is a true copy, simply to refresh his memory that he may give that testimony. It is filled out in blank, in the handwriting of the plaintiffs, Eliza Bell.
By the WITNESS: If these witnesses were residents of Tampa, it is very likely that I took it. But one of them resided in Manatee and one in Clearwater.

Q. But it is very easy to bring them here? Look at that paper (handing witness paper); did you take the testimony of those witnesses?
A. Yes, sir. Those witnesses, I think, F. Tresca, and Joseph Robles and Louis Bell.
Q. You do recollect taking their testimony?
A. Yes, sir. I do recollect taking it now.
96 Q. What did you do with that testimony?
A. Sent it to Gainesville.
Q. What was your custom in such cases, send direct to the office, or to the local attorneys representing the client?

A. Usually sent to the land office.
Q. Usual custom?
A. Yes, sir, and registered it.

And the plaintiffs, further to maintain the issue on their part, introduced as a witness one BENJAMIN RUSH, who being duly sworn, testified as follows:

Q. Mr. Rush, where do you reside?
A. Gainesville, Florida.
Q. How long have you resided there?
A. This August, twenty-eight years.
Q. State whether or not, and if so, how long, you rendered service, and in what capacity, in the United States land office at Gainesville?
A. When it was moved from Tallahassee, in '73, in *in* April, I went in as clerk, chief clerk. I was one of the chief clerks there for some seven, eight or nine years, and then went out as a practicing attorney, for several years, and then went back in again and out again. The last time in there, was from '89 till '94. Went out about two years ago, two or three years ago.
Q. Briefly, what were your duties in that office?
A. Well, I held the position of entry clerk, making entries.
Q. Have you any knowledge, or recollection, of the pre-emption claim of Louis Bell, Sr.?
A. Very well, sir.
Q. State whether or not you filed his pre-emption claim for him?
97 A. I did.
Q. You had a firm at that time?
A. Yes, sir; Hallad & Bush.
Q. State what you know, if anything—no. In the first place, can you state what the practice was in reference to this: If the office refused to receive proof, or writing, was that in writing?
A. No, sir; just verbally; just merely a verbal refusal. Wouldn't give you any writing; issued nothing to that effect.
Q. State now what you can recollect, in regard to the tendering of proof by Mr. Bell and his pre-emption claim, and his tender in money in payment, and its refusal.
A. It was in '84, in April. I think it was concluded to be advisable to go ahead and make proof and proceed in the regular way, notwithstanding the refusal of the office. I filed notice of intention to make proof, I think probably filed it in the last of February or the first of March, 1884. Paid the fee, which they did not recognize and refused, but we wrote down to Mr. Bell to advertise and proceed in the regular way and make his proof. I think on the 7th day of April, 1884, I think it was advertised to make proof before Judge Crane down here at that time, and some time the latter part of April the proof came up there, and I was the attorney of Mr. Bell to call at the land office and tender it, and see what they would do about it, and they declined to take any action on it. I went over there

when this proof came up, sent by Judge Crane. They refused the proof.

Q. Refused to consider it?

A. Yes, sir; that is what I mean. I then tendered the purchase-money for the land.

Q. To whom was that tendered?

A. John Billins.

Q. They refused it?

98 A. Yes, sir.

Q. Do you know on what grounds it was refused, money was refused?

A. Because of instructions from Washington.

Q. Was it or not on the ground that the land was not subject to pre-emption entry?

A. Yes, sir.

Q. Wasn't your firm acting under my advice as leading counsel in the case?

A. Yes, sir; corresponding all the time in regard to the matter.

Q. Look at that letter and state whether or not you received it from me.

A. Yes, sir; I did.

Q. Is that my handwriting?

A. I am pretty sure it is. I am familiar with your handwriting. Seen a good deal of it during the last twenty-five years.

Q. Got any promissory notes of mine unpaid?

A. I don't think I have.

By Mr. BISBEE: I would like to put this letter in evidence, confirmatory of what has been shown, merely showing that he was acting under my directions.

Counsel for defendant don't see the relevancy, but has no objection.

The letter was read to the court, and is as follows:

HOUSE OF REPRESENTATIVES,
WASHINGTON, D. C., *Feb'y* 3, 1894.

Messrs. Holliday & Rush:

99 In Bell's matter an appeal was taken soon after Commissioner's decision, which I regard as dodging the question.

I have, after some reflection, come to the conclusion that Bell should apply to make final proof, which under existing instructions, the office will reject, but do it and obtain the official rejection in writing.

Then tender the amount due at $1.25 per acre, and obtain written refusal to accept this. Please do what I have suggested, presenting the evidence, as it may be important by and by.

Yours, H. BISBEE.

The endorsements on the back thereof are as follows: H. Bisbee, Jr., February 3, 1884. Bell *et al. vs.* F. C. & P. R. R. Co. and Standard Oil Co. Read in evidence before the circuit court of the

United States, southern district of Florida. March 11th, 1897. E. O. Locke, clerk, by H. L. Crane, deputy clerk.

By Mr. KNIGHT: I believe that Judge Crane testified that none of these witnesses were ever brought before him.

By Mr. BISBEE: He testified that three of them had and one of them had not, is not that so, Mr. Clerk?

A. Yes, sir. Bell, and two others.

No objection being offered by counsel for defendant, the notice of intention to make final proof is read in evidence, and is as follows, with the endorsements:

100 *Notice for Publication.*

TAMPA, FLA., *March* 1, 1884.

Notice is hereby given that the following-named settler has filed notice of his intention to make final proof in support of his claim, and that said proof will be made before H. L. Crane, county judge of Hillsborough county, at Tampa, Florida, on April 12th, 1884, viz: Louis Bell, Sr., of Tampa, Florida, pre-emption No. 569 for the lots 8, 9, and 10, of section 24, township 29, south of range 18 east, and lot 16 of section 18, and lots 12, 13 and 14 of section 19, township 29, south of range 19 east.

He names the following witnesses to prove his continuous residence upon, and cultivation of said land, viz:

Joseph Robles, Sr., of Tampa, Hillsborough county, Florida; Captain Fred Tresca, of Braidentown, Manatee county, Florida; Captain Richard Booth, of Bay View, Hillsborough county, Florida; John Craig, of Palmetto, Manatee county, Florida.

LOUIS BELL, SR.

The endorsement- on the back, therefore, are as follows: United States circuit court, southern district of Florida. Bell *et al. vs.* F. C. & P. R. R. Co. Filed in evidence March 12th, 1897. E. O. Locke, clerk, by H. L. Crane, deputy clerk.

Cross-examination:

Q. Mr. Rush, you say that the land department refused to
101 accept money for this entry; were there any other entries on that lot eight by anybody else?

A. There were a great many filed at that time, you know, from different parties.

By the COURT: You ask upon what grounds they refused to receive it?

A. Yes.

By the COURT: Do you know?

A. I don't recollect positively right now.

Q. How long were you in that office?

A. I went in the office in '73, stayed there several years, and went out. In Gainesville a few years, a practicing attorney. When not in there, have been a practicing attorney.

Q. You were associate counsel with Colonel Bisbee, representing the Bell heirs?

A. Yes, sir.

Q. And you say you don't remember whether there were any other interested people there, pre-empting, homesteading, or otherwise, for lot eight?

A. I don't know but what there was, from the fact that my recollection was that these clients were all trying to claim the whole concern.

Q. Mr. Bell, himself, claimed the whole?

A. Under the homestead laws, one hundred and sixty acres. They were all trying to get the whole amount.

Q. How many claims to the best of your recollection were there to this tract?

A. You mean the whole reservation at that time. That is a little hard to remember.

By the COURT: As near as you can?

A. Two or three, or four, or something like that.

102 Q. Is it not a fact that there were thirteen, fourteen, or fifteen?

A. There might have been.

By the COURT: Perhaps the witness don't understand.

A. At the time he filed his claim, I don't remember just what each fellow filed for. But I remember they were all trying to claim as homestead and pre-emption.

Q. Wasn't Julius Cæsar an applicant for this property?

A. I don't remember whether for lot eight or not.

Q. Wasn't there a man by the name of Nelson?

A. I think so, sir.

Q. And Hackley heirs also?

A. Yes, sir.

Q. Is it not a fact that Dr. Carew also applied for this property?

A. Yes, sir. Made an entry on this tract.

Q. And didn't J. A. Carlisle, a cash entry?

A. I think he did, cash, or scrip, or something.

Q. Didn't the heirs of a man by the name of Bellknap apply to enter, too?

A. I don't remember that name, sir.

Q. Don't you remember the claim of a man by the name of Bellknap?

A. I don't remember.

Q. Didn't the city of Tampa also claim the property?

A. I believe they did.

Q. Didn't certain parties undertake to locate Gerard land scrip on that property—William B. Henderson?

A. I don't recollect just what kind of scrip.

Q. Didn't they undertake to locate some kind of scrip?

103 A. Yes, sir. That is so.

Q. Didn't Clifton Herrick also claim this property there, either to enter there by pre-emption or homestead?

A. I recollect his name in connection with it. I don't know whether he filed a pre-emption or not.
Q. Do you recollect the heirs of Stillings or Lewis?
A. Stillings' name is familiar.
Q. Do you recollect the claim of Frank Jones?
A. Yes, sir.
Q. And the claim of Chamberlain?
A. Yes, sir. Of course, when those names are called off they are familiar.
Q. Do you remember any other parties?
A. There were so many. When their names are called I can remember them.
Q. The matter was litigated in the department at Gainesville as to who was entitled to the property, was it not?
A. Yes, sir.
Q. And there was an appeal from the decision of the Commissioner of the General Land Office?
A. Yes, sir.

And the plaintiffs, further to maintain the issues on their part, produced as a witness one FRANK A. BELL, who, being duly sworn, testified as follows:

Q. Mr. Bell, where do you reside?
A. City of Tampa.
Q. How long have you resided there?
A. Am thirty-two years old. Since birth.
Q. Are you one of the plaintiffs in this suit?
A. I am.
Q. What was your father's name?
104 A. Louis Bell, Sr.
Q. When did he die?
A. '85.
Q. State what you know about your father being in possession of this lot eight, in question in this suit.
A. Been on it ever since I can remember.
Q. Been on there. Do you mean resided on that?
A. Yes, sir.
Q. House on it?
A. Yes, sir.
Q. Lived on it with his family?
A. Yes, sir.
Q. Lived on it with them?
A. Yes, sir.
Q. As long as you can remember?
A. As long as I can remember.
Q. Lived there continuously, ever since you can remember, up to the time of his death?
A. Yes, sir.
Q. Who resided in this house since?
A. My sister and brothers; brother, rather.
Q. Which brother?

A. Thomas J. He is now dead. Part of the time with my sister.

Q. Has the defendant railroad company railroad tracks across this lot?

A. They have.

Q. Where were you when the company entered on this lot and built those tracks?

A. I was in Tampa.

Q. Did you know of it at the time?

A. I did.

105 Q. How many tracks have they across it?

A. Four tracks, I think, only. Though one of them don't run the full length.

Q. Four part of the way and three all of the way?

A. Yes, sir.

Q. What is the general course of that road from the east, southwest and northeast, or how is it?

A. Southwest, you may say.

Q. Enters on the lot from the east, don't it?

A. Enters on the lot from the east and runs in a southerly direction, terminating, as near as I can get at it.

Q. Do you know whether or not plaintiffs, or any of them, consented to this company building its railroad on this lot?

A. No, sir; they didn't. On the contrary they objected.

Q. Who did they object to?

A. They objected to the parties who came there to construct the road at the time of its being brought there.

Q. What was the manner of the objection?

A. My brother went out there, and so did my mother.

Q. Protested against it?

A. Protested against it.

Q. Did you see them?

A. On one occasion I did. Not all through.

Q. Can you state about the date when they entered on the land, completed the railroad? Can you recollect the date when the company entered on the land and completed its road across this lot?

A. My memory is about December, '89, or January, '90.

106 Q. They commenced to build the road?

A. Yes, sir.

Q. Do you know what time it was completed?

A. I think it was completed in January and February, 1890.

Q. How far is the north boundary—or are you familiar with the location of the lot?

A. Well, I should say I was. I think I am.

Q. What street bounds it on the north?

A. Whiting street.

Q. How far is the north boundary line from this court-house, Hillsborough county?

A. Three or four blocks.

Q. Either three or four, cannot be both.

A. I think it is four blocks.

Q. Can you name the streets?

A. I won't be positive on there being four, but I think it is four.
Q. Can you name the streets intervening after Whiting?
A. After Whiting comes Washington, and next Jackson, and next comes La Fayette.
Q. Next here?
A. And the next is Jackson street.
Q. Then Washington and Whiting?
A. Jackson runs east and west. Washington, Whiting, Jackson and La Fayette. Four blocks, first Whiting, next Washington, then Jackson and La Fayette.
Q. The court-house would make the fourth block?
A. Yes, sir.
Q. What is the name of the river that runs through Tampa?
107 A. Hillsborough.
Q. How far is the west boundary of this lot eight from the Hillsborough river?
A. I couldn't give that definitely, only estimate it.
Q. What is your estimate of it?
A. I would say it is about four blocks.
Q. State whether there is any street railroad running down to, at or near this lot.
A. Street railroad running near it, yes, sir. The street railroad runs down by the F. C. & P. depot, and makes a curve and comes up Washington street, or Whiting street. From Whiting street goes up Florida avenue.
Q. What street does it run down?
A. From North Tampa and Ybor City.
Q. How near does it come to this lot?
A. Within a block of this lot.
Q. How are those cars propelled; animal power?
A. Electricity.
Q. Electric cars?
A. Yes, sir.
Q. Then, if I understand you correctly, the streets in Tampa run north and south and east and west?
A. Yes, sir.
Q. Whiting street bounds this lot on the north?
A. Yes, sir.
Q. State to the court what improvements, if any, on this lot were destroyed by the railroad company when they built the railroad.
A. Destroyed the fence, that portion that comes in contact with the railroad. Destroyed orange trees, cultivated trees and various other trees, fruit trees, I think. I would be certain about the guava trees and orange trees.
108 Q. Certain about those?
A. Yes, sir.
Q. How many orange trees were there destroyed, and their age?
A. Most of the grove on the south side of the dwelling.
Q. What dwelling?
A. Dwelling of Louis Bell. And I can only —, that is my memory

serves me, that there was between twenty-five and fifty; would strike a limit at fifty bearing trees.

Q. What were the ages of the trees, of the others?

A. From two years up to bearing.

Q. State whether or not you had crops from year to year from which you sold any fruit.

A. Yes, sir. Had crops of oranges ever since I can remember.

Q. From those trees?

A. Yes, sir.

Q. Then do I understand you that some of them were large trees?

A. Yes, sir. Some of them bore fruit since I can remember. Some very old trees.

Q. How much money, in any one year, do you remember of being received for oranges that were sold?

A. I have a distinct recollection, I think it was in 1884; I won't be positive, '84 or '85, that we sold in one bulk eighty dollars' worth of oranges, and prior to the time of that sale, we had made repeated smaller sales, ranging from one to five dollars. I would say that, in that year alone, we realized about one hundred dollars.

Q. Was the grove in as good condition when destroyed as this year you speak of?

A. Yes, sir. It was. We had a ready demand for oranges

109 Q. You don't profess to be a judge of the fruit of an orange tree do you?

A. I do not.

By the COURT: Do I understand that the grove was all destroyed by the railroad company going through there?

A. Just a portion of it.

By the COURT: What do you mean by just a portion?

A. I would say two-thirds of it.

Q. Was that part destroyed where the older bearing trees were on?

A. Yes, sir. Most all. The best of them were on the south side of the lot.

Q. What is the distance, do you think, between your house, the homestead residence, I will call it, and the south boundary of the railroad track?

A. My house is the south boundary.

Q. Your father's old homestead was north, that railroad is south?

A. My house is north of the railroad.

Q. How far? Does the railroad embankment come up?

A. Yes, sir. There is an excavation. The excavation, I suppose, is fifty feet from the house. Only a rough estimate, I never measured it, of course, and don't know.

Cross-examination:

Q. I believe you said your father had possession of that land ever since you can remember. How did he have possession?

A. He was living there.

110 Q. Had a line fence?

A. That portion I had reference to he did.
Q. How much?
A. Two and a half acres, I suppose; possibly three.
Q. Two and a half or three acres fenced by him?
A. Till the railroad company came through there and tore down the fence.
Q. And you were living on Whiting street?
A. Yes, sir.
Q. How many feet front were fenced on Whiting street?
A. I can't say how many feet were fenced
Q. Approximately?
A. Approximately I might say four hundred feet. That is my remembrance of it.
Q. How many feet deep?
A. About two hundred.
Q. Was that fence kept up all the time by him up to the time, and by the heirs up to the time of the taking by the railroad company?
A. Yes, sir, because we had a garden there. It was not a very beautiful fence.
Q. When did your father die?
A. Fall of '85.
Q. Then it was a period of four or five years after his death?
A. Yes, sir.
Q. Between the time of his death and this taking was that tract cultivated by the heirs?
A. Yes, sir, it was.
Q. After what manner?
111 A. Garden. I remember very distinctly of my brother raising quite a number of sugar peas and selling them to the Tampa bay.
Q. When was the Tampa bay finished?
A. I don't remember.
Q. Wasn't it finished about four years after the taking of that property by the railroad?
A. I cannot say as to that.
Q. Is it not a fact that the Tampa bay was finished only about four years ago?
A. I can't confine my memory as to that.
Q. You do know that your brother sold peas off of that piece of property to the Tampa Bay hotel?
A. Yes, sir.
Q. What improvements, if any, in the way of houses, outbuildings or structures were on that tract at the time of the taking?
A. We had a dwelling and chicken coop. That is about all of the structures, and necessary outhouse.
Q. Had a pump?
A. No, sir; had a well.
Q. That was also on this property?
A. It was.

Q. Now, do you know how many orange trees are planted in an acre?

A. I do not. I would state that these orange trees were irregular; not regular at all.

Q. Is it not a fact that more can be planted to the acre regularly?

A. I do not know, never having planted any orange trees, and of course cannot testify to that.

Q. How near is that Whiting street to the first railroad track?

A. You mean the south boundary of Whiting street?

112 Q. The first railroad track.

A. Approximately, I would say seventy-five feet.

Q. You will say, then, that your lot is seventy-five feet deep?

A. Approximately, but I don't know.

Q. Approximately seventy-five feet deep?

A. The lot was not ever surveyed squarely. We had it fenced in there, some portions wider than others.

Q. Now, Mr. Bell, this railroad that you say is approximately seventy-five feet from the south boundary of Whiting street, does it maintain that distance all along the track testified to, the approximate distance of seventy-five feet?

A. I wouldn't be able to verify that statement; I don't know.

Q. Is the railroad track any farther away from Whiting street at this end of lot eight than it is at the other end of lot eight?

A. Not as I know.

Q. Now, the remainder of this lot eight, which I believe contains seventeen acres, what uses was that put to prior to '89, by you, your father, or those heirs?

A. Outside of those portions which we had enclosed, I have no remembrance.

Q. It was wild, unimproved and uncultivated, was it not?

A. Yes, sir.

Q. Now, Mr. Bell, you say this fence was torn down by the railroad company. Who put that fence back again?

A. I am unable to say. I think we did, ourselves.

Q. You think you put it back yourselves?

A. Not my individual self. I think the heirs put it back.

113 Q. What kind of a fence was that?

A. It was a board fence.

Q. How many feet in length, approximately, was torn down by the company?

A. Why, I don't know, Mr. Knight, about three hundred feet, I guess. I am a shabby witness as to distances, I tell you that now.

Q. How high was that fence? What did it consist of?

A. Just a board fence, between four and five feet high.

Q. Boards lengthwise?

A. Yes, sir.

Q. Do you know what a fence of that kind is worth per foot?

A. No, sir, I do not.

Q. You say that in '84 you derived from the profit of oranges, which you had on that enclosure, in the neighborhood of one hundred dollars?

A. Yes, sir.
Q. Do you recollect what you derived in '85?
A. No, I don't.
Q. Do you recollect what you derived in '86?
A. Yes, sir. We didn't derive anything. We had a freeze.
Q. Do you recollect how much you derived in '87?
A. Do not.
Q. In '88?
A. Do not.
Q. In '89?
A. No, sir. We kept account of it in '84, and '85.

Q. Is it not a fact that in '86 we had a freeze that affected
114 the fruit on the trees, but did not seriously affect the trees?
A. Yes, sir.

Q. Were the trees taken care of after the freeze by your people?
A. They were.
Q. How many trees?
A. Between thirty-five and fifty. I struck a limit at fifty, I believe.
Q. Question was, How many trees in all? You say there was some guava trees, what is a guava tree worth?
A. I don't know. The intrinsic value of the tree itself is worth very little, I presume. A good guava tree would yield from two to three dollars a year, a prolific tree.
Q. Now you say that there was a street railroad running down there, that railroad runs to the F. C. & P. depot?
A. Yes, sir.
Q. Did it ever run on Whiting street before that depot was erected?
A. It did not.

Redirect examination:

Q. Can you have any recollection how many guava trees you had were destroyed, that is, can you recollect any given number?
A. No, sir. I would say between fifteen and twenty.
Q. Twenty and fifty?
A. No, sir. Fifteen and twenty.

Q. And how many orange trees in the lot in the whole
115 grove, including those that were destroyed and those that were not destroyed?
A. Quite a number of young trees.
Q. You have mentioned that they ranged from two years up?
A. I think there was something like two hundred in all.
Q. Is that lot all cleared up? State to the court whether that lot is all cleared, whether there are any forests or trees there.
A. All cleared, ready for cultivation.
Q. How long has it been cleared?
A. Ever since I can remember.
Q. What is the character of that soil?
A. Good soil, all sandy soil. Rather dark.
Q. You spoke of raising peas, what else did you raise there?

A. Kept onions, and have seen some corn growing there.
Q. Potatoes?
A. Potatoes.
Q. While the witness is on the stand, I will ask one other question. Has anybody else moved on that land since you have occupied that land?
A. There is.
Q. How many on it?
A. About twenty-two altogether.
Q. Business and residences together?
A. Twenty-two or *or* twenty-three.
Q. Does that include Mr. Starbird and Mr. Caruthers?
A. I think so.

116 Q. Do you remember how many were included in the suit of Prince Goode and Company?

A. I think about twenty-four, including those twenty-two, with Prince Goode and Starbird & Carruthers would make twenty-four.
Q. Standard Oil Company, they moved on that?
A. Yes, sir.
Q. How mar y persons had moved on that lot, come upon it prior to the railroad company building its track?
A. No remembrance, except one Joel B. Miles. I will say, however, if I am not mistaken, that most of them have moved on since the advent of the railroad. No one in my memory, prior to the railroad, except Miles.
Q. Are you sufficiently acquainted with the growth of the city to tell when the demand for property first commenced?
A. The demand for property commenced increasing in the city of Tampa in the advent of the location of Ybor city here.
Q. What time was that?
A. I don't know exactly what year they came here. I think some seven or eight years ago, possibly nine years. I don't remember.
Q. Can you state approximately how long these twenty-five or twenty-four other persons have been on this lot?
A. Generally speaking, been there since 1890. Some for longer, some for less time. Some of them came quite recently.

Recross-examination:

117 Q. Mr. Bell, the enclosure of the Bell heirs, commenced about how many feet from the western boundary of lot eight, on Whiting street?

A. From the western boundary of lot eight, on Whiting street, I would say about sixty feet.
Q. What is the first obstruction or location of structure, or anything, on lot eight, commencing on the south boundary of it, south of Whiting street, between Whiting street and the railroad tra*a*ck? My purpose in asking that question, is to find now the occupancy of that lot eight, from the south boundary to the east boundary, the south to the north, I mean; the first obstruction, first residence, or

anything, between the Bell enclosure, between that and the boundary of Whiting street, south boundary, is there anything between that?

A. The only place is this business college, if that reaches your question.

Q. Yes, sir.

A. The business college next to the Bell enclosure.

Q. The next to that is the Starbird mill?

A. Yes.

Q. Next to that is what?

A. J. M. Eddings; and Caruthers, used to run a saw-mill, he now resides there, the next house I am living in.

Q. Next to that?

A. Nebraska avenue.

Q. What next to that?

A. That is all.

Q. All that you have designated lies between the railroad track and Whiting street?

A. Yes, sir.

118 Redirect:

Q. Who resides on this lot?

A. E. B. Euston.

Q. What do they call it?

A. Commercial college.

Q. How did you get on to it?

A. I just went in there.

Q. Went in somebody else's house?

A. Yes, sir.

Q. Who is Mr. S. W. Swindle?

A. Section boss, F. C. & P.

Q. Where does he reside?

A. Up northeast of the Bell estate, I think.

Q. On the south side of the railroad?

A. Yes, sir. On the south side of the railroad.

Q. Is there a lot and house on it?

A. Yes, sir.

Q. Living on it?

A. Yes, sir.

Q. How long?

A. About a year, a little more.

Q. Any place fenced in?

A. Yes, sir.

Q. Approximately, how much?

A. I would say a quarter of an acre fenced in. He cultivates there about a quarter on an acre.

Q. Does his fence come up to the railroad track?

A. No, comes within about twenty feet of the ditch. I think twenty or thirty feet of the ditch.

Q. The Standard Oil Company, how near the railroad track do they come?

119 A. Right near the track, within fifteen feet of it.

Q. You don't know what area they occupy, do you?

A. I would say 110 by 70, I should say.

Q. What side of the railroad track?

A. South side.

Q. You don't know whether any of these parties occupying within one hundred feet ever pay rent to the railroad company?

A. No; of my own knowledge; no, sir.

By Mr. BISBEE: With the consent of counsel I introduce map made by Mr. Garret, and will examine him in regard to it when he comes; the map of lot eight, recently made, since this suit was brought.

By Mr. KNIGHT: You understand we do not consent to the introduction of the map for the purpose of showing the number of acres.

By Mr. BISBEE: Admitted for all purposes, by consent except the exception as given.

The following is the map, with the endorsements:

(Here follows map marked p. 118½.)

And the plaintiff further to maintain the issues on their part, introduced as a witness one GEORGE BOOKER, who, being duly sworn, testified as follows:

Q. What is your name?

A. George Booker.

Q. Where do you reside?

A. On the corner of Franklin and Whiting streets.

Q. Do you know the location of this lot eight, in question in this suit?

A. No, sir; I do not know that I am familiar with all the lines. I have a general idea of the whole of the property.

Q. You say you live on Franklin street?

120 A. Corner Whiting and Franklin.

Q. But you know the location generally?

A. Yes, sir.

Q. How long have you resided in Tampa?

A. Since '86.

Q. What has been your business during that time?

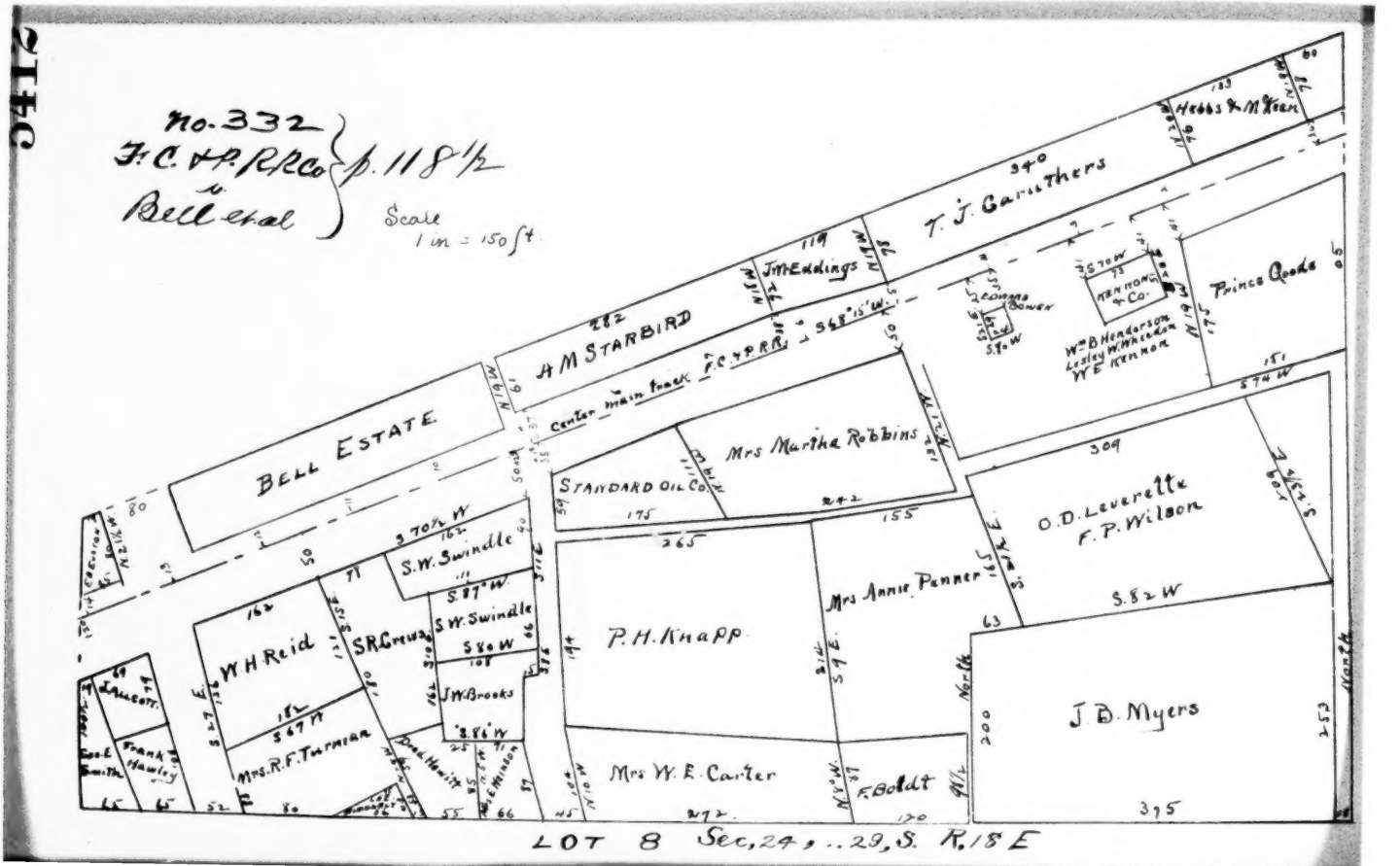
A. Lumber and saw mill business most of the time.

Q. Have you ever been a real-estate agent, or engaged in real-estate business?

A. Yes, sir; I think I went in the real-estate business in 1894.

Q. Were you acquainted with the rental values of real estate in Tampa prior to that time?

A. Well, I don't know as I was particularly. I would be familiar with the rental value of real estate on occupied lands. I don't claim to be any special expert in that line. Pretty hard value to fix.


No. 332
T. C. & P. R.R. Co.
to
Bell et al
p. 118 1/2
Scale
1 in = 150 ft.
BELL ESTATE
A M STARBIRD
T. J. Carruthers
J. M. Eddings
Hobbs & McKeen
Prince Goode
Mrs Martha Robbins
STANDARD OIL CO.
O. D. Leverette
F. P. Wilson
Mrs Annie Penner
P. H. Knapp
S. W. Swindle
S. W. Swindle
W. H. Reid
S. R. Crews
J. W. Brooks
Mrs. R. F. Turman
Frank Hawley
J. B. Myers
Mrs W. E. Carter
F. Boldt
Center main track T. C. & P. R.R.
LOT 8 Sec. 24, ..29, S. R. 18 E

Q. You say you have been in the business since '94. Are you acquainted now with the values of real estate, or rental value of property, in the vicinity where this is?

A. I have property for sale in that vicinity in Tampa, and around, but I don't hardly know how to fix the rental value on the property, because I don't know of any property that has been leased in that vicinity.

Q. How do you usually fix the value?

A. By the rental value. A fair per cent. on the valuation.

Q. The usual way?

A. That is always taken into consideration.

Q. What, in your opinion, is a fair cash value, per acre, of this property involved in this suit, lot eight?

121 By the COURT: I think he has not shown himself to be an expert. He can testify to any facts, if he knows positively, but he states positively and distinctly that he does not claim to be an expert.

By Mr. BISBEE: By the rules laid down in this State, 28th Florida, any party who has a general knowledge. Now I understood him to say that since 1894 he had been engaged in this business, and had a general knowledge.

Q. Do you or do you not claim to have a distinct knowledge of the value of lands in that vicinity?

A. I can only reply, just as I have replied before, that I do not claim to be an expert, and can only offer an opinion from the knowledge of values of land sold by me in that vicinity.

By the COURT: I do not think he can give his opinion; only facts.

Q. State the price of land sold in that immediate vicinity.

A. Lots on the opposite side of Whiting street are held by the Travelers' Insurance Company there, the corner lots at seven hundred and the inside lots at six hundred dollars. Fifty-two and a half feet front, facing on Whiting street.

Q. How deep?

A. One hundred and five feet deep.

Counsel for defendant moves to strike, because they might hold it for $10,000.

Q. Are you speaking of sales?

A. That is the values at which they hold it. Been so few sales made recently that it is very hard to predicate values on sales,

122 not only on lands in that vicinity, because there was no chance to sell it.

Q. But do you know of any actual sales?

A. None adjoining that property. A block this way was the last sold I know of.

Q. On what street?

A. Between Jefferson and Washington, sold at auction, about three-fourths of the lots.

Q. You don't know then, of any property being sold in the immediate vicinity?

A. No, sir. Not recently. Lots on those streets sold during the last six years, seventy-foot lots, were sold anywhere from $350 to $500.

Q. What size lots?

A. Fifty by seventy-foot lots.

Q. What is the usual size?

A. Those lots were fifty feet by one hundred and five. Some seventy by one hundred and five feet deep.

Q. Do you know when the growth of the city of Tampa, in real estate in the city of Tampa, when real estate was at its highest value?

A. Couple of years ago.

Q. When was there what I would call an active demand for property?

A. About that time.

Q. Two years ago?

A. Yes, sir. As soon as Tampa commenced to grow the values increased.

Q. Since two years ago up to date been diminishing?

A. Yes, sir.

Q. Since Tampa commenced to grow?

123 A. Growing steadily along, slowly since I have been here, for ten years, but had the most rapid strides in growth the last five years. I think the making of Ybor City was in 1886, and of course the growth has been since then. But those values do not affect these values.

Q. You know of no other sales except those you have mentioned?

A. No, sir. There has been no sale that I had known of recently.

Q. Those lots you speak of are how far from Whiting street?

A. One block intervening between them and the Bell land. Sold for $2,100, about three-quarters of a block. The whole block was two hundred and ten feet square. There were seven lots, about fifty-two and a half by ninety-five feet.

Q. Where was that?

A. Don't remember the number of the block. The block on which the children's home was located.

Q. About three-quarters of a block?

A. Three-quarters and twenty-three feet additional.

Q. Unimproved land?

A. Yes, sir.

By the COURT: Do you know of any rental property in that portion of the town? Do you know this? Do you know what rule, if any prevails in Tampa in real estate, in the renting of real estate, with respect to the rent, as proportioned to its cash value?

A. No, sir. I cannot say that I do. I never heard of any rule.

Q. How do you arrive at rental value?

A. A good deal depends upon whether you can rent it at all or not. A good many instances, in which you can't do it.

124 Q. But if you were, if a party applied to you?
A. I think I would try to get a fair per cent. on a fair valuation.
Q. Is that the only way to get at it?
A. I know of no other.
Q. You have no interest in this suit, have you?
A. No, sir.
Q. No bias or prejudice?
A. No, sir.
Q. Have you talked with anybody about the suit?
A. Reckon I have discussed it as freely as everybody else has. All glad to see it settled some way.
Q. Do you remember when the defendant built its road across this land?
A. Yes, sir.
Q. Have you any knowledge as to whether the plaintiffs or any one consented to its being built?
A. I don't know whether they consented. I know they protested at one time.
Q. In what manner?
A. They ordered the contractor for the construction off the premises in my presence.

Cross-examination:

Q. Mr. Booker, you know where Florida avenue is?
A. Next street.
Q. And the next street is Marion?
A. Yes, sir.
125 Q. Commencing at Marion street and going up Whiting, adjoining this lot eight, do you know of a single, solitary piece of ground sold in the last seven years, that is immediately adjoining this tract, if you know, please?
A. North or south?
Q. On Whiting street. I ask the witness if, commencing at Whiting street, or at Marion street, on Whiting street, at the interseetion of Marion and Whiting, and thence running along on Whiting, do you know of a single, solitary piece of property being sold in the last seven years?
A. I do not.
Q. Do you know of a single piece of property being leased on that street, adjoining the Bell property?
A. I think property has been sold there, but not of my own knowledge. I have not sold anything there.
Q. Have you heard of any one else selling there?
A. ——.

Counsel for plaintiffs object.
By the COURT: If he does not know himself, that would be objectionable.

And the plaintiffs, further to maintain the issues on their part, introduced in evidence one CHANCEY W. WELLS, who being duly sworn, testified as follows:

Q. Mr. Wells, what is your full name?
A. Chancey W. Wells.
Q. Where do you reside, Mr. Wells?
A. I reside in the city of Tampa.
Q. How long have you resided there?
A. About twenty-eight years.
Q. What has been your business or occupation during that time?
A. Nursery business, culture of orange trees and such like.
126 Collection, and so on.
Q. Collection of what?
A. House collections.
Q. You mean collecting rents?
A. Yes, sir; rents.
Q. Have you been engaged in buying and selling real estate, or renting real estate?
A. Yes, sir; somewhat.
Q. How long?
A. Well, for the last ten years.
Q. How long have you been engaged in collecting rents for landlords?
A. I have been collecting for myself for about six years.
Q. Do you know the location of the property involved in this suit, lot eight?
A. Partially; yes, sir.
Q. What do you mean by partially?
A. I am acquainted with the land, but not of the metes and bounds of it.
Q. You know substantially where it is located, do you?
A. Yes, sir.
Q. Do you own any property near it?
A. No, sir; none.
Q. Have you any knowledge generally, or specifically, of the value of lands in that vicinity, or what was its value, say from the first of January, 1890, up to date?
A. I have some knowledge of the value of the land.
Q. You have some knowledge?
A. But more especially, of other parts of the city.
127 Q. Have you any knowledge of the value of land in that locality?
A. I think I have, somewhat.
Q. You think your knowledge sufficient to testify as to a fair value of the land there?
A. I think so.

By the COURT: A fair value of the land for rental or use and occupation up to '96, I think, would be a fair estimate of the value of the property.

Q. As I understand you, you have been in business here from '89 up to the present time?

A. Yes, sir.

Q. Will you please state to the court what, in your opinion, is a fair value of this land per acre during those years, and in connection with that state what you consider a fair rental value. I am speaking say from the first of January up to the present time. If, in your judgment, it varies in the different years, state how much.

A. Well, I should think the land would be worth at that time about three thousand dollars an acre, if I was going to buy it at that time.

Q. You mean in '90, or all the years?

A. In my estimation it has risen in value ever since.

Q. What would you consider its value in 1891, '92, '93, '94, '95, and '96, per acre?

A. Well, I should say now it was worth about six thousand dollars an acre.

Q. How much in '93 and '94?

A. About the same. The value has not increased much the last two years. Between three and four and five thousand dollars. I should judge now worth about six thousand dollars per acre.

128 Q. Upon what do you base your estimate of its value?

A. Well, I put my estimate on what I have heard, upon what I see and know, and upon what property is selling for here in the city, and what other people have estimated the property along there worth.

Q. You base it, then, upon the knowledge you have acquired, engaged in that business?

A. Nothing that I have sold, nor nothing that I have had anything to do with, but upon personal knowledge. If I was going to buy it.

Q. Assuming that somebody wanted to rent that land during these years, wanted to use it, to occupy it, what in your judgment would have been a fair rental value for the land per acre, from the time I speak of from January, 1890, up to the present time?

A. A fair rental value per acre per annum?

Q. Yes, sir. If you were not to be paid till the end of the year?

A. The rental value I should judge about one hundred dollars per acre.

Q. One hundred dollars per acre?

A. Ground rent.

Q. You think that would be a fair valuation?

A. I think so.

Q. Per year?

A. Yes, sir.

Q. I don't know as I quite understand you. You think the value, now, of six thousand dollars has not increased much in two years? At what point of time, in your judgment, do you think it reached the value of six thousand dollars? You testified, as I recollect in January, it was worth three thousand dollars?

A. Yes, sir. Well, about——

129 Q. Did you say in '93?
A. Well, in '94.
Q. First '91 you have testified worth three thousand dollars?
A. Yes, sir.
Q. Now, at what time do you think it reached the value of six thousand dollars?
A. Well, I think the time is now.
Q. But from how long ago?
A. It reached the value about two years ago.

Cross-examination:

Q. Mr. Wells, all that you have been testifying to is guess-work, is it not?
A. Guess-work?
Q. Yes, sir.
A. No, I don't count it all guess-work.
Q. Most of it is, is it not? Do you know of a single, solitary piece of property sold by any one since '89, on Whiting street, from Marion street westwardly, and if so, state to whom and what the consideration, if any, was paid for it.

Counsel for plaintiff submits to the court that it is not a fair question, for then it will involve on plaintiffs to show why there has been no sale and why the town has grown in a different direction. The question is what the railroad company ought to pay for this property, for the time they occupied this property.

A. (To Mr. Knight's question.) I don't know of any.
130 Q. Do you know of a single piece of unoccupied property any place in the vicinity of the tract in controversy, that has been leased for any purpose since 1889, and if so, state to whom, and what the consideration, if any, was paid for the lease?
A. In what locality? X
Q. I said in the locality of the lot in controversy.
A. I don't know of late. I stated this upon my own judgment, if I were to appraise it for sale.
Q. You state that the rental value was one hundred dollars, was that one hundred dollars per annum?
A. If I was going to lease it.
Q. Upon what do you base that?
A. Well, I would base that upon a reasonable rental.
Q. Well, for what purpose?
A. Base it upon a reasonable rental.
Q. Well, for what purpose—strawberry culture, or celery culture, or business blocks, or what?
A. Well, lease it for a residence, or something like this, or garden.
Q. Assuming that there was no title to this land up to July, 1896, what up to that time, and from the 1st of January, 1890, was a fair rental value per acre for that land, the Bell heirs previously having applied to homestead that land?

Counsel for plaintiff moves to strike out the latter portion.

Counsel for the plaintiff- moves to strike the question as it stands now.

By the COURT: You may answer that question, taking into consideration the fact that until 1896, when finally determined, that any one taking that land, would have to take the chances of
131 getting the title there, what under those circumstances would you consider a fair rental value for that property?

Counsel for plaintiff- excepts to the ruling of the court, on the grounds that under the evidence in the case, at this stage of it, the plaintiffs have the right of possession, and the right to the use of the lot of land in question and the legal right to rent the same, and give a good title to the lessee.

The court overrules the objection and counsel for plaintiffs except.

A. It is so far back, I rather not give any idea about the lease so far back.

Q. How far back?

A. '90.

Q. Have you not been testifying back to '90 all the time?

A. Couldn't give a proper price for the land so far back as that about a lease. Now I will testify now that I think the lease would be worth so much, or the land worth so much. The land at that time was worth so much, but I don't know about the lease.

By the COURT: Do I understand if a fee-simple title could have been given and a perfect lease, then it would have been worth one hundred dollars per acre ground rent?

A. Yes, sir.

Q. Supposing there was a doubt as to his title, and a question of how long the lessee could remain in possession of that property, then what in your opinion, was a reasonable ground rent to that piece of property in controversy?

By the COURT: Would it make a half or a quarter, or fifty per cent., what difference in your opinion would it make?

A. If I wanted to rent the land it wouldn't make any
132 difference. If I wanted to rent the land I wouldn't care if John or Jack or who owned it. I would pay to the man I rented of.

Q. Whether he had title, or didn't have?

A. Yes, sir.

Q. Have you ever done that?

A. Yes, sir. Never done it here.

Redirect examination:

Q. If you had been called upon the first of January, 1890, to appraise this land, per acre, what would you have *have* appraised it at?

A. In '90?

Q. Yes, sir. With your knowledge of the value of that land at that time?

A. Three thousand dollars, an acre.

Q. Do you know anything about what the purposes of property towards the river is, whether adapted to warehouses, saw-mills, machine shops, etc.?

A. Yes, sir. Saw-mills, warehouses etc.

Q. Do you know the location of the Standard Oil Company's business?

A. No, sir. Not exactly. I know where it is.

Q. You know where it is?

A. I think I do.

Q. Look at this map.

A. All I know about the Standard Oil Company, is where it is located down by the river.

Q. That map is scaled fifty feet to the inch. What would
133 you consider a fair rental value of that piece marked out there, marked Standard Oil Company. The dimensions are given, 190 that way, 175 that way, 111 that way, etc.?

A. I really wouldn't know, unless I could see the property and make an estimate on it.

Q. Will you do me the favor during recess to go down there and look at it?

A. Yes, sir. I will.

Q. You don't know what improvements are on that property, do you?

A. No, sir. I do not.

And the plaintiffs further to maintain the issues on their part produced one W. H. GARRETT, who being duly sworn, testified as follows:

Q. What is your name, Mr. Garrett?

A. W. H. Garrett.

Q. What is your business?

A. Civil engineer.

Q. How long have you been such?

A. Thirty years.

Q. Where do you reside?

A. Tampa at present.

Q. Do you know the location of lot eight, section twenty-four, township twenty-nine, south, range eighteen, east?

A. Yes, sir.

Q. Ever made a survey of it?

A. Yes, sir.

Q. Please look at that paper and say what it is?

A. A map of lot eight.

Q. Who made it?

A. I did.

134 Q. How long ago?

A. About four months. I think it was in November.

Q. Just open it there please. What is the length of the railroad on that, from east to west?

A. 1,424 feet.

Q. Did you run it out accurately?
A. Yes, sir.
Q. How many railroad tracks are there on that land, on the lot?
A. To the best of my recollection, there are four, but they do not extend the whole way.
Q. How many extend the whole way?
A. One, possibly two.
Q. Are you sure there are not three?
A. No, sir. Not three.
Q. What distance do the four extend?
A. I think there are about four thousand feet of tract all told on that lot.
Q. Four thousand lineal feet you mean?
A. Yes, sir. But I am not positive, that is my impression.
Q. Please look at that place marked Swindle, do you know Mr. Swindle?
A. No, sir.
Q. Will you state to the court how far from the railroad track, or the right of way there, it extends back, which is marked Swindle?
A. From the center of the track, or right of way there, 156 feet.
Q. How deep? From the ditch?
A. No, sir. Two hundred and six feet from the center of the track, occupied by Mr. Swindle.
135 Q. You know that Mr. Swindle lives there, don't you?
A. I have been told that he lives there.
Q. Who is he?
A. I think he is section foreman on the F. C. & P. railroad.
Q. Take the Standard Oil Company there, how far do they extend or occupy from the center of the track, from the ditch?
A. I have it one place thirty-eight feet from the center of the track on the west side.
Q. To the southern boundary?
A. Ninety-seven feet from the center of the track to the south boundary.
Q. Please state to the court whether you have ever made any measurement and calculation of the amount of soil there was removed in constructing that railroad track, in making the ditches.
A. Yes, sir.
Q. Please look at that paper and say what you know about it. (Handing witness paper.)
A. This is a statement that was made by myself.
Q. What do you mean by statement, conclusion?
A. Yes, sir. Conclusion the same thing. Statement made by me. It was measured in section of 100 feet. Cross-sections taken at those intervals.
Q. And you measured the number of cubic yards?
A. Yes, sir.
Q. What was taken?
A. I measured the quantity of cubic yards in the ditches and on the surface of the track made by the F. C. & P. road.

136 Q. Please state what number of cubic yards of earth were removed?

A. 1,217 cubic yards.

Q. Have you any means of knowing, or do you know what it would cost to restore the land occupied by the track to its natural condition?

A. Yes, sir.

Q. State to the court what it would cost.

A. I think it would cost about seventy-five cents a yard. That would be a conservative estimate. Available material is distant. I arrive at that, for twenty-five cents has to be paid before removing.

Q. What kind of material?

A. Earth.

Q. Is it sand, as good as the original soil?

A. Yes, sir, I suppose about the same.

Q. How far does it have to be hauled?

A. About a mile and a half.

Q. None available nearer than that?

A. None nearer than that, that I know of.

Q. Would you know of any available nearer?

A. Yes, sir. I am acquainted. That is probably the closest material that could be obtained.

Q. Is it not a fact that seventy-five cents per cubic yard is the cost of material and cost of hauling?

A. I would put that at a close price, the closest a contractor would be induced to take it. He might make a little on it. It involves some time and labor to haul the material off.

Q. And labor to level it off?

A. Yes, sir.

137 Q. Have you ever observed the improvements of the Standard Oil Company there? What buildings are on it and whatever else is on it?

A. Yes, sir.

Q. State to the court what is on that lot occupied by the Standard Oil Company.

A. Well, a building there, the front of it is occupied as an office. But I never have been inside of it. It is probably twenty feet wide and possibly sixty or eighty feet long. Built right on the track and there is a little yard enclosed; right by the side of that a tank, iron tank.

Q. Well, do you know of any other there?

A. Office building.

Q. How many tanks are there?

A. Never noticed but one.

Q. The one nearest the railroad?

A. No, sir. Only one that I saw. There may be another inside the house.

Q. Do you know anything about the value of these tanks?

A. No, sir.

Q. Did you observe the size of the tank you saw?

A. Not particularly.
Q. Is there not a stable on that lot?
A. I think there is, but am not positive about that.
Q. Didn't notice particularly?
A. No, sir.
Q. Can you state approximately how far from the Hillsborough river is the western boundary of that lot?
A. Yes, sir.
Q. How far is it?
A. I think it is about eight hundred feet.
Q. State to the court the width of the strip north of the
138 railroad track.
A. One hundred feet.
Q. This strip you mean?
A. Exactly one hundred feet.
Q. Does the railroad, then, run parallel to the northern boundary?
A. Yes, sir.
Q. Can you state the distance from the ditch from the embankment south to Whiting street, in the vicinity where the Bell residence is? North, I mean.
A. I don't exactly comprehend. That is about thirty-five feet, the distance from the center of the track to the embankment.
Q. There are certain names of persons. Who wrote those names there?
A. I did.
Q. Do I understand that those persons were living there when you made the survey?
A. Not in all cases. Some cases nobody on the property at all.
Q. Whose names are there that are not on the property?
A. One Boyt and another and one Miss Annie Henson. Her property was mixed at that time, and it was hard to tell what she claimed.
Q. There are three then that are not there?
A. Yes, sir.
Q. C. Wilson, there was a house there?
A. Smith claimed that there was no house on this part of it.
Q. W. H. Reed, there is no one on that, no building on it?
139 A. Saw-mill it was. One of those lots that Swinton claimed there, there was no one on. The south lot from his, the one next to the railroad track.
Q. The one used for a garden?
A. Yes, sir.
Q. Who lived on that one?
A. No one.
Q. And that garden connected this lot?
A. There was a fence between.
Q. You don't know whose garden it was?
A. I didn't know at that time, but I was told that that was his claim.

Cross-examination:

Q. Garret, I understand that from Whiting street to the railroad track, extending from one end of lot eight to the other, the distance is one hundred feet?

A. Yes, sir; from the north boundary of lot eight to the center of the railway track is one hundred feet.

Q. From one end of the track to the other?

A. Yes, sir; from the center of the track to the north boundary of the lot.

Q. Is that the north boundary of the track?

A. This is the center of the track.

Q. Is that the ditch that represents the lot?

A. Yes, sir.

Q. How far is the ditch north of what you call the center of the track?

A. Maybe six or eight feet.

140 Q. How many tracks are there there?

A. Three.

Q. Not more than six or eight feet from the center of the track up to that lot?

A. No, sir; all the tracks run on that side. One track runs within six or eight feet of the south boundary of that lot. I said the ditch on the side of this fence here. When I was there it would have been easy enough to have got those tracks exactly, but I didn't take any note of it.

Q. From the ditch to Whiting street it is approximately eighty-one feet?

A. Well, yes; that depends upon what range you include in that term. Approximately it is. All these measurements were made from the center of the track.

Q. Now, is there any track there closer to Whiting street than the track from which the center line is one hundred feet distant?

A. On the lower part of it, along here, I think there is. The track along here runs right close to the passenger shed.

Q. I mean right here, whether there was a track any closer to Whiting street than the one of which the center line is one hundred feet distant?

A. I don't know. Cannot say positive. That is the main track; there may be side tracks there. I did not notice. There may be several tracks, but I don't remember which side they were on.

Q. How far distant is it from that fence there to Whiting street?

A. Probably seventy-five feet.

Q. From the south line of the Bell enclosure to the south line of Whiting street?

A. Yes, sir.

141 Q. What land there is occupied by the railroad company, other than the land occupied by its track?

A. Well, there is enough there for a roadway not occupied by a track; only runs into the Standard Oil Company, and on the other

side of the track. There are probably three tracks for one thousand or eight hundred feet.

Q. How wide, from a point six feet north of the track or tracks, to a point six feet south of the track or tracks, is it, approximately, from one end of lot eight to the other?

A. I think the whole width occupied by the railway company there is approximately seventy-five feet. That is, the way it is now, but the tracks do not take up that much room.

Q. I mean whatever the tracks take up?

A. Probably fifty feet.

Q. Would average fifty feet?

A. I mean from one ditch to the other.

Q. What distance did you say it was?

A. 1,424 feet.

Q. When did you first become acquainted with this tract?

A. In what respect?

Q. With its location and the general conditions of it, and the people who lived in it?

A. Last summer.

Q. Did you know anything of the condition of that tract of land and of the tracks of the defendant and of the location of these people named on this map, prior to last summer?

A. No, sir.

Q. When did you make this map?

A. This map was made in November.

142 Q. At the time you made the map you say Reed was not in possession of the property?

A. Reed was not living on it.

Q. Was Mrs. Turman?

A. I think she was.

Q. Was S. R. Cruse?

A. I think he was.

Q. Was Greg Hewett?

A. I think so.

Q. Brooks?

A. I think Brooks was there.

Q. Mrs. Carter?

A. Yes, sir.

Q. F. P. Wilson?

A. I don't think he was there at the time.

Q. Prince Goode?

A. He was not.

Q. George P. Smith?

A. On part of this lot.

Q. I believe you stated it was worth seventy-five cents a cubic yard to remove sand?

A. Yes, sir.

Q. Of course you do not know who removed that, so far as you are concerned?

A. I know that it was made by the railway people.

Q. Is not seventy-five cents an exorbitant price for excavation for railway purposes?

By Mr. BISBEE: No, sir. That was not my question. It was to restore the land to its former condition.

Q. How long have you lived in Tampa?

143 A. About Tampa for fifteen lyears. Not in the immediate vicinity for the last two years.

Q. Do you remember anything of Ybor City?

A. No, sir. I was not here then.

Q. Don't you remember the city council contracted to make excavations there to fill in for forty-five cents per cubic yard?

A. I am willing to tell Mr. Knight that I am willing to get out some material for ten cents a yard, but I do not have to haul it fifty feet.

Thereupon the plaintiffs recalled GEORGE BOOKER, who having been previously sworn in this case, testified as follows:

Q. Mr. Booker, in your testimony, you refer to the fact that you saw the parties protest to the contractor, about the company coming on this land, do you remember of seeing any orange trees or any orange tree, or any orange grove on this land?

A. Yes, sir.

Q. State to the court the character of the trees, if you remember that?

A. It has been a good, long time, and of course I did not charge my memory particularly with it, but I have been by the property frequently, and I well remember that there had been orange trees there, but as to how many, or the condition of that property, I don't like to state. But there were old trees, I remember.

Q. Large bearing trees?

A. Yes, sir. They were old trees.

Q. What do you mean by old? Too old to bear fruit?

A. No, sir. Young trees are not in bearing, others full-bearing trees.

Q. That is what you mean by old trees?

144 A. Yes, sir.

And the plaintiff-, further to maintain the issues on their part, introduced in evidence one THEODORE WILLIAM-, who being duly sworn, testified as follows:

Q. Mr. Williams, what is your full name?

A. Theodore H. Williams.

Q. What is your occupation?

A. Engineer.

Q. State whether or not you know where the Standard Oil Company have their tanks and buildings in this city?

A. It is on the other side of the track, on the reservation.

Q. State to the court the number of tanks, the size and the value?

A. Three large tanks. I don't know the size exactly. They are all sheered up in brick-work. I did not measure the size of them.

Q. Upon brick foundations?

A. Yes, sir. All put up.

Q. Do you know what such tanks would cost put up there?

A. No. I could come pretty near it. I go by all the improvements that are on the buildings. I suppose about five or six thousand dollars' worth of improvements on the place. Probably cost that to put it there.

Q. My own object in showing this, is to show that the value of this property exceeds two thousand dollars.

Q. How long have those improvements been there?

A. I couldn't tell.

Q. Been there three months?

A. I should judge they had.

145 Q. You don't know how long they have been there?

A. No, I could not tell.

Q. How many tanks did you say there are?

A. Three of them.

Q. Couldn't you give the value of those tanks in question and the cost of putting them there? The value of the improvements.

A. The cost of those and the putting them there, probably cost in the neighborhood of about four thousand dollars, probably a little more.

Cross-examination:

Q. Captain, have you ever put any tanks up, or known of any one to purchase tanks the character of those?

A. Seen the cost of a good many of tanks that size. I didn't examine the tanks close.

Q. How did you figure an estimate of that if you did not examine them closely?

A. Well, I judged from what I have seen of other tanks of that size.

Q. You are in the Government employ, are you not?

A. Not at present, I am not.

Q. Are you not engineer on the Suwannee?

A. No, sir; not at present.

Q. Since when?

A. Twelfth of December.

Q. Prior to that time you were in the Government employ for what length of time?

A. For a little over seven years.

146 Q. Do you know the cost of work, outside of Government service?

A. Generally come at. The contract is given as low as they can. Probably some men build them tanks a thousand dollars less than another man.

Q. Do you know, outside of your Government service, what work of that kind is worth?

A. Probably Merrill and Stevens in Jacksonville will build that tank five hundred dollars cheaper than they can get it in New York for.

Q. What is it worth to build a tank like those?

A. A thousand dollars apiece.

Q. Do you know the dimensions of the tank?

A. No, sir.

Q. Wouldn't make any difference, whether fifty or *or* ten feet in diameter, price be just the same? Would it not make any material difference as to the size of those tanks as to what they would cost?

A. I didn't look for what there was to them.

Q. What examination did you make of them?

A. Didn't make any of the tanks. Looked at the brick-work up there. Saw they were nicely set up.

Q. What character of brick-work is there?

A. Masoned up same as under the boiler would be. Same as you would mason up a boiler.

Q. How much brick-work is there?

A. Probably five or six thousand brick.

Q. How much are those brick worth, laid per thousand?

A. I don't know what they sell brick for.

Q. How do you know how to estimate the value of that property if you don't know how to estimate the value of the improvements?

147 A. If you want to go down as close as that you want to get a boiler-maker, a brick mason and a man to carry the hod.

Q. Are you a brick mason?

A. No, sir.

Q. Boiler-maker?

A. No, sir.

Q. Hod-carrier?

A. No, sir. I gave an estimate of five or six thousand dollars. Didn't think it could be put there for less than that.

Q. And that you gave without being an expert, either in boiler-making or in masonry?

A. Yes, sir.

Redirect examination:

Q. You say you are a civil engineer?

A. Yes, sir.

Q. In what department?

A. Channel.

The plaintiffs further to maintain the issues on their part introduced one ALFRED WAGNER as a witness, who being duly sworn, testified as follows:

Q. What is your name?

A. Alfred Wagner.

Q. Where do you live?

A. In Tampa, here.

Q. What business?

148 A. Machinist.

Q. What kind of work, in iron and wood?

A. Both, yes, sir.

Q. Do you know where the Standard Oil Company are located in the city?

A. No, sir.

Q. Ever seen the tanks?

A. Only at a distance in crossing this lot.

Q. Have you ever seen that tank nearest the railroad track?

A. Just as I was coming to work, saw them on the cars.

Q. Have you any recollection as to the size?

A. About nine or ten feet in diameter. Eighteen or twenty feet long.

Q. Do you know the value of such a tank?

A. If I know the size and weight.

Q. Such a tank as you describe?

A. How thick is the material?

Q. I don't know.

A. That you must have.

Q. Thick enough to be of service for the purpose of using it as an oil tank?

A. Be about thirty-six hundred pounds at about eight cents a pound.

Q. You mean that is the value of it put up?

A. That wouldn't include the freights.

Q. I mean the value of it put up there?

A. I mean the value of the tank where it is made, whether here or in New York.

149 Q. Do you know anything about putting up a tank like that, the cost, with the mason-work?

A. No, I don't know about mason-work.

Cross-examination:

Q. Mr. Wagner, I understand, then, that the cost of a tank like that, put up in this place, is about eight cents a pound?

By the COURT: When you say put up, you don't mean put up in position?

A. I am talking about the iron-work, that is all.

Q Mr. Wagner, what is a tank worth put up in this city?

A. I don't know about putting up.

Q. I mean the boiler itself.

A. About eight cents a pound.

Redirect:

Q. What do you mean by put up?

A. Built.

Q. You don't mean set on brick-work.

A. Everything except the brick-work.

Thereupon the plaintiffs caused FRANK BELL, a witness on their part, to be recalled, who, having been duly sworn, testified as follows:

150 Q. State to the court, if you know, when the Standard Oil Company moved on this lot?
A. About February, 1896.
Q. What part of February, as near as you can recollect?
A. About the middle of February.
Q. Have they been occupying it there since?
A. Yes, sir.
Q. State to the court, if you know, what improvements were on this lot, what were there last December. Describe briefly the number of buildings, tanks, etc.
A. A building there.
Q. For what purpose?
A. Used for the purpose of the Standard Oil Company's office, or for any purpose they want to have it for.
Q. How large a building?
A. About thirty by sixty.
Q. One-story building?
A. One-story building.
Q. Tin roof or shingle?
A. Shingle, I think; won't be sure.
Q. What else?
A. A stable.
Q. What else?
A. Three oil tanks.
Q. Occupied continuously since February, 1896?
A. Yes, sir.

Thereupon the plaintiffs further to maintain the issues on their behalf produced as a witness one RALPH B. SEIVER, who being first duly sworn, testified as follows:

Q. What is your name?
A. Ralph B. Seiver.
Q. Where do you reside?
151 A. Tampa.
Q. How long?
A. Twenty-two years.
Q. What has been your occupation or business during that time?
A. Last seven or eight years been in the real-estate business.
Q. What does that embrace?
A. Usually selling of real estate on commission. Sometimes property of my own.
Q. Buy and sell real estate?
A. Yes, sir.
Q. Own any real estate, have you any in the city?
A. A little.

Q. Do you know the location of this lot eight, section twenty-four?

A. I know where the Bell heirs' is. I don't know the lines of the property.

Q. Do you consider yourself as having a sufficient knowledge of real estate, to testify as to the value of real estate in the city of Tampa?

A. I think so.

Q. Will you please state this: Supposing the first of January, 1890, you had been called upon, to appraise the value of this land occupied by the railroad company. You know the railroad track across there, I suppose. What would you have valued it per acre?

A. Some portions of that property valued at a great deal more than others.

Q. That is north, suppose that is the center of the track, (showing witness map).

A. Do you mean any particular portion of it?

Q. I mean an average price per acre, that the railroad
152 company occupied?

A. You don't mean in here?

Q. Just the railway?

A. I should judge about two thousand dollars.

Q. Say the 1st of January, 1890?

A. $1,800 or $2,000 per acre. The first of January, 1890, that would be my opinion. Some worth more than that, some worth less; I should say that would be a reasonable average per acre.

Q. From $1,800 to $2,000 per acre?

A. Yes, sir; I don't know what the acreage is.

Q. In your judgment did it increase in your opinion after that time in value?

A. Yes, sir; I think so.

Q. State what your judgment about that is to the court, say in '92 and so on down to '96?

A. I should judge about double in value. There has been quite an increase in property in that locality, and I should say that it would be worth double today what it was worth seven years ago.

Q. That would be a conservative estimate?

A. I think so.

Q. Suppose any one wanted to rent that land the first of January, 1890?

A. I suppose ten per cent. of the value of the property would be a fair rental value.

Q. That is one element in estimating?

A. Yes, sir. That is the way I would estimate. If I had deeds for the property, I would expect to get a percentage on the value of the property.

Q. What time in your judgment was the property the highest value?

153 A. Well, I don't think in the last two years property has advanced much. Probably worth two years ago just as much as it is today.

Q. What is the means of getting at that lot by rail from the city?
A. By either line, the 7th Avenue line or Franklin Street line.
Q. Both electric cars?
A. Yes, sir.
Q. How near does each run to the lot?
A. This boundary goes west on Marion street, if I know exactly where the boundary lines are, it runs about a block from the property.
Q. Which line?
A. It is all one line.
Q. Have you any interest in this suit?
A. None whatever.
Q. Do you own any land near there?
A. I do not.
Q. Do you know of any sales having been made there recently?
A. Not right there. I had understood that there had been some sales made over east of there, on some of those subdivisions east, along the railroad.
Q. How far were those sales made from there?
A. I don't know anything about the property. I understood from other real-estate men that some sales had been made there.
Q. Do you know to what extent?
A. I do not.
Q. On the reservation west of this?
A. East of this. I think immediately adjoining this
154 property, but I can't tell.
Q. Do you know through whom those sales were made?
—. I think through Captain Walton. I know he had the property for sale and think he had sales there. I don't know but what Col. Stevens has made sales there, he had some property along there.

Cross-examination:

Q. You say you have property in this city in your name?
A. Yes, sir.
Q. Where?
A. In Ybor City.
Q. How much?
A. (The court did not insist on his answering this.)
Q. You say that you are a property-owner yourself?
A. Yes, sir.
Q. Do you know the Parkman property?
A. I don't know exactly. I have talked with Mr. Smith about the Parkman property, but do not know exactly the location.
Q. That was put in your hands for sale once, was it not?
A. No, sir, it wasn't.
Q. Didn't Mr. Stevens here speak to you about selling the Parkman property?
A. Yes, sir. Is that the Parkman property?

Q. And how much did he tell you to sell it for?

155 A. I think he made me a price of three hundred dollars for a lot there, provided the house was moved off, and afterwards he made me a price, but I couldn't tell without referring to my book. I think it was $550 for the house and all.

Q. This Parkman property is how far from this Bell property?

A. I don't know, because I don't know how far those lots reach. I think it is adjoining to it, in the same vicinity.

Q. It contains one acre, does it not?

A. I don't remember. I would say less than half an acre.

Q. Is it not a fact that you, as a real-estate agent, were told by Colonel Stevens that you could sell that property with two houses for fifteen hundred dollars? Is it not a fact that Mr. Stevens told you, as a real-estate agent, that you could sell this Parkman property, with the two houses on it, for fifteen hundred dollars?

A. No, I don't think the Colonel ever made me a price, except for one house and one lot.

Q. Do you know, of your own knowledge, of any property in the vicinity of the Bell tract having been sold in the last seven years, and, if so, what property, and what was paid for it? I do not mean on Franklin or Washington street. Say commencing at Marion and running thence westerly.

A. No, sir; I don't know of any at all. That is, unless it is this property farther east.

Q. You are speaking of the Jones tract sold to the S., F. & W.?

A. No. I am speaking of the property that Walton laid out there. I think that Whiting street has been continued through that property.

Q. Do you know of any land in that vicinity that has

156 been leased in the last seven years for any purpose?

A. I do not.

Q. Do you know of any land of that character in this city, that has been leased any time, within the last seven years, at the basis of ten per cent. on its ground rent?

A. I have known of property. But I don't know that I can get your idea exactly. Do you mean similarly located?

Q. Yes.

A. No, I don't know that I do.

Q. Well, do you know of any property in this city, residence property, that has been rented, ground rent for past ten years for ten per cent. of its valuation, or in the last seven years?

A. No, sir.

Q. Do you know of any that has been rented for five per cent. of its valuation?

A. I am not aware that any has been rented for residences.

Q. Then, as a matter of fact, you do not know of any property that has been rented in this city for the past seven years, ground rent, for residence purposes. Your residence is in Ybor City?

A. Yes, sir.

Q. How far from this tract in controversy?

A. A mile and a quarter, or a mile and a half.

Redirect:

157 Q. Who was that gentleman you said authorized you to sell the lot for three hundred dollars?

A. Colonel Stevens.

Q. What size of lot?

A. I don't remember. My recollection is, it was about fifty foot front. One hundred and thirty feet, perhaps one hundred and forty feet in depth. It may be a little larger, but that is my recollection. I don't remember the figures. It was somewhere about fifty feet frontage and 130 or 140 feet in depth.

Q. Land near the railroad track is not desirable for residences?

A. No, sir.

Q. What depth?

A. I think 130 or 140 feet. I don't remember the figures, but I think that is it.

Q. 130 or 140 one way and fifty the other?

A. Yes, sir.

Q. Will you state to the court what use the land is adapted to?

A. I would imagine for warehouses and such purposes as it is being used for at present.

Q. Do you know anything about a sale across the street to a Mr. Starbird in the last two years?

A. No, sir. I do not. You say a sale of the property, no, sir. I do not.

Recross-examination:

Q. Would you say that the running of that railroad across that land has depreciated the value or that land or increased it in value?

158 A. I would say that it had depreciated it. Because, I think, outherwise it would have been a fairly good residence part of the town, and it has stopped the advance of property down that way.

Q. Do you know of anybody living on that tract before the railroad went there?

A. No, sir. A few squatters.

Q. Is it not a fact that there are six people living in this vicinity now, where there was one living there when the railroad went across that tract?

A. Yes, sir. I think so.

Q. Taking a space of seventy-five feet wide, the whole length of this track, the south side of Whiting street, between it and the railroad, would you say that it had been depreciated by the running of that railroad across there?

A. It depends altogether upon what the purpose — that it was to be used for.

Q. I believe you said it could be used for warehouse purposes?

A. In taking that view, I don't think it has been.

Q. You think then that property is more valuable for residence purposes than for business purposes along railroads?

A. No.

Q. Then how did you state that it had been depreciated in value?

By Col. BISBEE: He said for residence purposes.

A. I said I didn't think it had.

Q. Well, then it is more valuable for business purposes as a rule?

A. Yes.

And the plaintiffs, further to maintain the issues on their
159 part, introduced as a witness one GEORGE MACFARLANE, who, being duly sworn, testified as follows:

Q. Mr. Macfarlane, where do you reside?

A. Tampa.

Q. How long have you resided here?

A. A little over nine years.

Q. Have you been engaged in buying and selling real estate for yourself and other people ever since you have been here?

A. Yes, sir. I was in the real-estate business here at one time.

Q. How long?

A. I guess about six or seven years. Six years anyhow.

Q. Were you engaged in that business between the first of January, 1890, and the present time, at any time?

A. Yes, sir.

Q. Do you know the location of the lot in controversy in this suit?

A. Yes, sir, I know where it is located.

Q. Do you know where the F. C. & P. runs down there from its depot?

A. Yes, sir.

Q. Have you any knowledge as to the value of that land, or of land in that locality, during those years?

A. Yes, sir. I think I know about what I consider it worth.

Q. You ever buy any property in the vicinity?

A. Well, I bought some two or three blocks from this piece in controversy.

Q. Which direction?

A. Corner of Washington and Pierce.

160 Q. Do you not claim a general knowledge of the value of property in that locality?

A. Yes, sir.

Q. Will you state to the court this: Suppose you had been called upon, the first of January, 1890, to appraise the value of that land per acre, what would you have said would have been a fair valuation?

A. Well, I should say worth about four thousand dollars an acre.

Q. That was in January, 1890?

A. Yes, sir.

Q. Has it decreased or increased in your estimation?

A. Increased some.

Q. When you say increased, that is in your judgment, it has increased some?

A. Yes, sir.

Q. Assuming that in 1890, some one wanted to rent this land the

railroad was on, what would you consider a fair rental value for that land?

A. Well, if I would rent any real estate, I would rent it at a percentage on the value.

Q. Don't you usually determine the value of land by what it will rent for?

A. Well, I would consider the percentage on it.

Q. Well, and you would also consider the adjoining property, and the use to which it could be put?

A. Yes, sir.

Q. Well, what would you say would be a fair rental value of that land, assuming that some one would want to rent it?

A. I would say ten per cent.

161 Cross-examination:

Q. Mr. McFarlane, would you have rented that land in 1890, and paid four hundred dollars per acre for it per annum?

A. If I had any use for it.

Q. What use could you have made of it?

Objected to by counsel for plaintiff. Objection overruled, exception noted.

Q. What use could you have put it to?

A. I could not have put it to any use especially.

Q. You wouldn't have rented the land at all, would you?

A. I don't rent things I can't use.

Y. Do you know of any land in this city unoccupied, that has been leased in the last seven years?

A. Well, I know of a business lot that has been leased. No one leased residence property that I know of.

Q. Do you know what use that land was put to when the railroad run on it?

A. No, sir. I don't.

Q. Do you know whether it was kept cultivated, or wild and unimproved?

A. I don't remember whether improved, or unimproved.

Q. Do you know of any property that sold there in the last seven years for four thousand dollars an acre?

A. Yes, sir.

Q. Where?

A. W. A. Carter bought a piece of property at the corner of Whiting and Marion.

Q. Right across from the depot, or is it not in front of the warehouse?

162 A. No, sir. Farther east. I think he paid twelve hundred dollars for a quarter of an acre.

Q. Is it not a fact that there is an extraordinary difference in the values of property in this city, even from one block to another, from Franklin to Florida avenue?

A. When you come from a business street to a residence street, yes. Certainly a big difference.

Q. Is it not a fact that you cannot judge the value of property from one block to another?

A. No, sir. I think in a residence portion I could judge the value from one block to another.

Q. Is it not a fact that lots on Hyde Park avenue vary? Eight to twelve hundred dollars for a lot on one side, whilst lots on the other side of the street are three to four hundred dollars per lot?

A. I don't know that. I suppose you of course are correct. Maybe it was because they were not opened up.

Q. You cannot designate from block to block. Some blocks differ, is that not a fact?

A. You take in this neighborhood up there, there is very little difference in the value of property, in my opinion.

Q. Would you say that the price that Mr. Carter paid for his lot would have been a reasonable price for the same area in that tract there at the same time?

A. The land wasn't opened up. That makes a difference. I think the land was worth what I stated as acreage property.

Q. Do you know of any other property except Mr. Carter's sold there?

A. No.

Q. Was that sold in the last seven years?

A. Yes, sir.

Q. Do you know of any other?

163 A. Taliaferro bought there too, close to that. I don't know what he paid for it.

Q. Has not Mr. Taliaferro sold the same recently?

A. He sold it to Lalane. He sold it about a year ago.

Redirect examination:

Q. Is this Carter property on Whiting street?

A. Whiting and Marion, the street east of Florida avenue.

Q. Is that the avenue the railroad runs up?

A. Yes.

Q. (By Mr. Bisbee, with the map:) Marion street, as I understand it, would come right across that.

The plaintiffs, further to maintain the issues on their part, introduced as a witness one PAUL B. LALANE, who, being duly sworn, testified as follows:

Q. What is your name?

A. Paul B. Lalane.

Q. Where do you reside?

A. In town.

Q. How long have you resided here?

A. Eleven years.

Q. What is your business or occupation?

A. Book-keeper.

Q. Book-keeper where?

A. Crowell & Miller's.
Q. Do you know where this lot eight is located?
A. I know where Bell's house is.
164 Q. Have you bought any property in that vicinity recently?
A. Yes, sir; a year ago.
Q. Where was it located?
A. Corner of Florida avenue and Whiting street.
Q. How much did you buy?
A. Described in the deed as the south ninety feet of lot three, block 88.
Q. You know how wide it is one way?
A. Ninety by one hundred and five or one hundred and fifteen; am not sure which.
Q. Who did you buy of?
A. Mr. T. C. Taliaferro.
Q. What did you pay for it?
A. Three thousand dollars.
Q. What was the value of the improvements on it?
A. The house was on it.
Q. What did you estimate that in buying?
A. $2,000.
Q. Then you thought you got a bargain?
A. Yes, sir.
Q. That was about a year ago?
A. Yes, sir. A year ago.

Cross-examination:

Q. Pay cash for it?
A. No, sir.
Q. On what terms did you buy it?
165 A. On private terms, Mr. Knight. I borrowed part of the money from the building and loan association.
Q. If a certain discount was allowed you, but you paid a little more, than if you paid cash, would you consider the private terms an advantage to you?
A. I would consider them to be fair. I think Mr. Taliaferro was offered, an hour before he sold to me, $2,750, the sale to be made within ten days.
Q. For cash?
A. I understood so.
Q. And you considered that it would be a fair discount on account of the terms?
A. Yes, sir.
Q. And you were working for Mr. Taliaferro at the time?
A. I was.
Q. You consider the improvements on your lot worth $2,000?
—. Yes, sir. They cost more.

And the plaintiffs, further to maintain the issues on their part, introduced as a witness one A. J. KNIGHT, who, being duly sworn, testified as follows:

Q. Where do you reside, Mr. Knight?
A. Tampa.
Q. How long have you resided here?
A. About nineteen years.
Q. What business are you engaged in?
A. Real estate.
Q. Do you know the location of this lot eight?
A. Yes, sir.
Q. Do you own any land near this part of this reservation, so called?
166 A. No, sir. Not nearer than the corner of La Fayette and Franklin.
Q. Have you sold any land near there, either for yourself, or as agent, recently?
A. Last piece of property was to Mr. Carter.
Q. Where?
A. Corner of Whiting and Marion.
Q. Have not you sold any recently over near Mrs. Carew's
A. Yes, sir. Over on Franklin street.
Q. It is the lot farther south?
A. It is on Franklin street.
Q. An extension of Franklin street? State what you sold recently over there.
A. We have sold, I think, four lots on Franklin street.
Q. Property of Mrs. Carew?
A. Hampton.
Q. But it is known as the Carew property?
A. Yes, sir.
Q. What size of lot?
A. Fifty by ninety-five feet.
Q. What did you get?
A. Seven hundred and fifty dollars apiece.
Q. Fifty by ninety-five?
A. Same size as these, only there is an alley to them.
Q. Well, how far are those lots from the south boundary, assuming that this is the map (produces map)?
A. Three blocks from this to Franklin street.
Q. Well, how far would you say from this western boundary?
167 A. Well, about eight hundred feet.
Q. You say you sold this Carter property, property of Carter?
A. Yes, sir.
Q. Where is that located?
A. Corner Whiting and Marion.
Q. How large a piece of property?
A. Quarter of an acre.
Q. To whom?

A. Mr. Carter.
Q. Any improvements when you sold it?
A. No, sir.
Q. What did you get for that?
A. I think it was twelve hundred dollars.
Q. That was several years ago?
A. Yes, sir.
Q. How long ago was that?
A. I think it was about four years ago?

Cross-examination:

—. Were those lots you sold on Franklin street for cash or on time?
A. Instalment plan.
Q. By the month or year?
A. On four years' time.
Q. Was that sale to Carter for cash, or on time?
A. For cash.
Q. That lot adjoins Mr. Taliaferro's lot?
A. Yes, sir.

168 Redirect examination:

Q. About the rental value of land. How do you fix it? You have land for rent, either for sale or rent, how do you fix the value?
A. According to what purpose they want to use it for.
Q. For residence or business purposes either?
A. I always get all I can, all it will bear.
Q. Don't have any fixed rules?
A. No, sir.
Q. What would you consider a fair valuation of the rental value, according to its cash value or market value; what percentage would you consider ordinarily prevails here in Tampa, as far as your knowledge extends?
A. On business property, there are some lots here would be a big per cent. But I don't know of any leased outside.
Q. In the case of business property, how do they range on Franklin street?
A. The only places I know of having been leased are from ten to fifty dollars per month. The only property I know of having been leased is two lots up Franklin street. One adjoining the South Florida railroad, and leased for forty dollars per month, and the other is the Le Duc property. The Le Duc property is considered worth about $100 per front foot. The other $150.

The plaintiff thereupon recalled Mr. GARRETT, who having been already sworn, testified as follows:

Q. I wish you to state, according to the map you made, the dimensions occupied by the Standard Oil Company. If I understood you correctly they have it all fenced in?
169 A. Yes, sir. They have it all fenced in. Three-tenths acres approximately.

And the plaintiffs further to maintain the issues on their part introduced as a witness one M. E. GEROW who being duly sworn, testified as follows:

Q. What is your name, Mr. Gerow?
A. M. E. Gerow.
Q. Where do you reside?
A. Tampa.
Q. How long have you resided here?
A. Three years.
Q. What is your business or occupation?
A. Agent for the Standard Oil Company.
Q. Do you have charge of their business, on lot eight, involved in this suit, near the railroad?
A. Yes, sir.
Q. State to the court when the Standard Oil Company went on that land?
A. A year ago this last January.
Q. Do you know what the value of the improvements are put on that lot?
A. No, sir. I do not know exactly.
Q. Do you know approximately?
A. No, sir; I do not.
Q. Know what they cost?
A. No, sir.
Q. Has the Standard Oil Company been continuously in possession, ever since they went in possession in 1891?
A. Yes, sir.
Q. How many tanks?
A. Three.
Q. What dimensions?
170 A. Ten and a half, the other six feet.
Q. About how long?
A. About twenty in length. Never measured exactly, was about twenty. Another six by six by eighteen.
Q. The other?
A. The same.
Q. What buildings have you on it?
A. Just a warehouse barn and little open shed.
Q. Were the improvements and tanks all put up prior to December, 1896?
A. Were finished I would say, about the fifth of January, a year ago.
Q. A year ago?
A. Yes, sir.
Q. It having been five days after you took possession?
A. I was doing business there before the buildings were really completed.
Q. You say you was not on the lot before then?
A. I was on the lot about the second of January. The buildings were not quite finished when I went there.

Q. Then, it had been occupied before you went there?
A. Nothing except the buildings had been put up.
Q. You don't know when the company first commenced to put up the buildings?
A. I think they were working there about a month.
Q. Before you got there?
A. Yes, sir. Before I got there.
Q. You got there the second of January, before the fifth?
171 A. I would say about the second of January, somewhere about that.
Q. Are you acquainted with the value of this property?
A. Not as a real-estate agent.
Q. The improvements, I don't mean real estate?
A. Well, it is not very much. Second-class lumber, all rough lumber.
Q. I mean the improvements and the oil tanks. I mean the whole improvements, what do you consider them worth, approximately?
A. Approximately, I would say they were worth about two thousand dollars.
Q. Do you remember whether any one of the parties objected to your going on that property?
A. Never objected to me.
Q. By whose permission did you go on?
A. I was put on there by the Standard Oil Company.
Q. Did you pay rent to anybody?
A. Not that I know of.
Q. You have no knowledge that they pay rent to anybody?
A. No, sir.
Q. What are your initials?
A. M. E.

Plaintiff rests.

By Mr. BISBEE: There are some affidavits I desire to introduce in evidence. I suppose they will be considered by the court in evidence. I refer to the affidavit of additional pleas here, in the Standard
172 Oil Company case, and also the affidavit of you, Mr. Knight, for a continuance, and any facts admitted in this will be admitted in evidence, I understand.

And the defendant, to maintain the issues upon its part, introduced as a witness one F. A. SALOMONSON, who, being duly sworn, testified as follows:

Q. You may state your name.
A. F. A. Salomonson.
Q. How long have you resided in the city of Tampa?
A. Thirteen years and over.
Q. State your occupation or profession.
A. Real-estate agent.
Q. How long have you been engaged in the real-estate business?
A. Fifteen years.

Q. You may state whether or not you are a large property-owner in this city.

A. I am, sir.

Q. You may state whether or not you are acquainted with lot eight in the reservation commonly known as the Bell property.

A. I am, sir.

—. State if you are acquainted with the values of real estate in this city, and have been since 1890.

A. I have, sir.

Q. You may state what, in your opinion, lot eight of the Bell tract is worth in your opinion per acre at the present time, and what it was worth in 1890.

A. I would say that it is worth $1,000 an acre.

Q. What would you say it was worth the first of January, 1890?

A. I think it was worth about a thousand dollars an acre at that time.

173 Q. Now, Mr. Salomonson, what was that property worth at that time, for ground rent, if anything?

A. I do not think it was worth much, if anything, for ground rent at that time.

Q. What do you think it was worth for ground rent, if anything, until the Bell heirs obtained title to that property?

A. I do not understand that question.

Q. Could that property have been leased for ground rent, of your knowledge, prior to the time that the title was settled?

A. I do not think it could.

Q. Did you know that property prior to January, 1890?

A. Yes, sir.

Q. You may state how much of that property we occupied and how much was wild and unimproved and uncultivated approximately?

A. Prior to '90, except a few squatters had moved on there, the Bell home was the only place I knew was cultivated.

Q. How much?

A. I don't remember exactly, but probably about one acre.

Q. Now, Mr. Salomonson, was the balance of that property, to your knowledge, prior to 1890, and for seven or eight years before, during the period of your residence in this city, used for any purpose whatever?

A. Not that I remember.

Q. (Producing paper.) Now, Mr. Salomonson, is the railroad, assuming that this be a map of the railroad, and this being Whiting street and this being the railroad running along there, leaving a space of seventy or eighty feet between the railroad and the south

174 line of Whiting street the entire distance, would you say the running of the railroad across that increased or decreased its value?

A. Increased its value.

Q. Then would you say the balance had been decreased or enhanced?

A. Enhanced.

Q. Mr. Salomonson, do you know of any property, within the period of your residence in this city, having rented for residence purposes, simply ground rent?

A. Only know one. That is on Tampa street.

Q. Whereabouts?

A. Tampa street, between Hillsborough and Fortune.

Q. That was rented for residence purposes?

A. Yes, sir.

Q. For how much?

A. Five a month.

Q. How far from the land in controversy?

A. Almost a mile.

Q. Mr. Salom-son, when did the first railway enter the city of Tampa?

A. In 1883.

Q. What road?

A. The South Florida.

Q. How far from that railroad is the Bell tract situated?

A. Didn't figure that. Well, I should say about half a mile.

Q. Prior to the railroad entering the city of Tampa, how was the transportation done?

A. A hack line.

Q. What else?

A. A boat.

175 Q. Where did those boats come to with reference to the Bell tract?

A. At the foot of Whiting, between Whiting and Jackson.

Q. At the foot of Whiting and Jackson, which was near the Bell tract?

A. Yes, sir.

Q. Then subsequently the South Florida railroad came in?

A. And moved everything away from that tract.

Q. How far?

A. Less than half a mile.

Q. Then when did the cigar factories in Ybor City locate?

A. In 1886, I believe.

Q. And how far were they from the Bell tract?

A. About a mile and a half.

Q. Then on up to 1890 was the tendency of the growth of the city away from the Bell tract or towards it?

A. Away from the Bell tract.

Q. In 1883 before the South Florida railroad came to this city, was there anything where Ybor City now stands?

A. There was none there, they came with the railroad.

Q. What was the tendency, then, of your knowledge of the growth of this town, of the coming into this city of the Florida Central and Peninsular Railroad Company?

A. It aided to a certain extent in bringing things back to the lower portion of the town.

Q. Was that the only thing that held that part of the town at all?

176 A. Yes, sir.

Q. When was Port Tampa first developed into a port?

A. I ain't certain of that. I should say eight or nine years ago.

Q. Did the vessels coming into Port Tampa now, come into the city of Tampa then?

A. Large steamboats.

Cross-examination:

Q. What use did you consider this property could be put to? Mercantile, manufacturing or storage? You have given the value of this whole tract in 1890, what was it in 1892,-'93 and 94?

A. About the same.

Q. No increase in value?

A. May have been at certain times, but wasn't enough to make anybody pay any attention to it.

Redirect:

Q. Mr. Salomonson, do you know where the Parkman property is?

A. Yes, sir.

Q. You may state whether or not that was given to you to sell?

A. A quarter of an acre.

Q. What improvements?

177 A. Two houses.

Q. What is the nature of those houses?

A. Ordinary frame houses.

Q. How far is that property from the Bell tract?

A. A very short distance.

Q. What were your orders to sell the property for?

A. $1,200.

Q. Have you been able to sell it?

A. No, sir.

Cross-examination:

Q. What part of this city do you live in?

A. Hyde Park.

Q. Across the river?

A. On Hillsborough bay.

Q. How do you happen to be so well posted?

A. Because I do everything in the real-estate line that belongs to it, and I loan money on it.

Q. When was you last over this property?

A. About a week ago went over the crossing.

Q. What did you go over it for?

A. To look at it. To look at a place there.

Q. Have you talked over this with counsel for opposite party?

A. No. They merely told me they wanted me to come here as a witness.

Q. Do you, with others, have any contract in regard to building this railroad, before it was built?

178 A. No, sir. I have not.

Q. Were you one of the parties that guaranteed the company against all damages that might occur?

A. No, sir.

Q. Do you know who they were?

A. Yes, sir. Mr. Taliaferro and Knight and Wall, Mr. Giddens and various other merchants in this town.

Redirect:

Q. Mr. Solomonson, will you say that they guaranteed into the city or simply the reservation land?

A. No.

And the defendant further to maintain the issues on *their* part introduced as a witness one W. H. BECKWITH, who being duly sworn, testified as follows:

Q. You may state your name?

A. W. H. Beckwith.

Q. Mr. Beckwith, how long have you been a resident of the city of Tampa?

A. In the city and vicinity about eighteen years.

Q. What business are you engaged in and have been for the past eight or nine years?

A. Real-estate business.

Q. You may state whether or not you are a large property-owner in this city and vicinity?

A. I own some property here, sir.

Q. Is it not a fact that you are a large property-owner?

A. Well, I might be classed as such.

179 Q. Mr. Beckwith, are you acquainted with the values of real estate in this city, and were you acquainted with the values for the past eight or nine years?

A. I am.

Q. Do you know lot eight, commonly known as the Bell tract in the reservation?

A. Yes, sir.

Q. Did you know its value in January, 1890?

A. You mean the entire tract?

By the COURT: Or any distinguishing portions, if you think one portion worth more than another, state so.

Q. Take the map to guide yourself, state what the value of that property was in 1890, assuming this to be Whiting street and that to be the railroad running there, leaving a space seventy-five or eighty feet for the railroad extending down the south line of Whiting street.

By the COURT: At a fair average what the land would be worth per acre. What was the value of the property at that time?

A. About eight hundred, possibly a thousand dollars.

Q. How much would you say the value of it was in July, 1896?
A. One thousand to twelve hundred dollars.
Q. Now, Mr. Beckwith, would you state that the running of that railroad there, through that tract, as it is designated on that tract, has enhanced or decreased the value of that property?
A. It has held its value in the last few years.
Q. Knowing the growth of the city, the means of transportation to the town, prior to 1883, the coming into the State of the South Florida railroad, the building of Ybor City more than a mile from the track, and the growth of Port Tampa City, what would
180 have been the condition of that property had it not been for the F. C. & P. coming in over it?
A. The town was building away from the tract and it would have decreased.
Q. Then the F. C. & P. held the value of that property?
A. So far, it has.
Q. Mr. Beckwith, in January, 1890, for resident purposes, what, if anything, was the ground rent of that property worth per acre?
A. I don't think you could have rented it for that purpose.
Q. Could it have rented for any purpose?
A. None that I know of, except possibly for pasturage.
Q. And for pasturage, what would it have been worth per acre?
A. Not necessarily a great deal.
Q. Five or ten dollars?
A. I do not know of any ground having been rented for that purpose, and I do not know what you could get for it.
Q. There is no fixed value for ground rent in this city for property of that character?
A. Not that I know of.

And the defendant, further to maintain the issues on its part, introduced as a witness one A. J. KNIGHT, who, being duly sworn, testified as follows:

Q. Mr. Knight, how long have you been a resident of this city?
A. Nineteen years.
Q. I believe that you stated before that you were acquainted with the Bell tract.
A. Yes, sir.
181 Q. You may state what business, if any, you are now engaged in.
A. Real-estate business.
Q. For what length of time have you been engaged in that business?
A. Last two years.
Q. You may state whether or not you are a large property-owner in this city.
A. Yes, sir.
Q. Is it a fact that you are one of the largest property-owners in this city?
A. Yes, sir. I own a good deal of property here.

Q. You have been engaged in selling and buying your own property for a long time?

A. The last eight or ten years.

Q. Do you know the value of property in Tampa at the present time and for the past eight or ten years?

A. I think I do.

Q. Do you know the value of the Bell tract?

A. Yes, sir.

Q. You may state what the value of that property was at the time of the F. C. & P. crossing it, that is if there is any difference. This is Whiting street, that is the railroad, and that is a distance from the railroad to Whiting street of about eighty feet.

A. This is the more valuable part of the property. About a thousand dollars an acre.

Q. Which?

A. Down towards the F. C. & P. depot.

Q. What was the effect of the railroad coming across that land?

182 A. That is hard to say. I don't think it depreciated it any, and for some purposes I think it increased the value of it.

Q. What would have been the condition of that property, in your opinion, knowing the growth of the city and the means of transportation to the city, prior to the running of the South Florida railroad into it, and the building of Ybor City, what would have been the condition of that property in July, 1896, had not the defendant run its line across that land?

A. The trend of everything was to go up the river.

Q. What caused that? Did the building of that railroad up there keep business going that way, and the building of this road keep it where it was, is that a fact?

A. That is a fact.

Q. Do you know where the Bell heir enclosure is?

A. Yes, sir.

Q. Do you know how much was occupied prior to January, 1890?

A. In the original enclosure, I think there was about two or two and a half acres.

Q. What was in that enclosure?

A. A few orange trees around the house. The other part there was nothing.

Q. What was there where the railroad track came?

A. The railroad track; that went through the orange trees.

Q. How many orange trees, approximately, do you think they destroyed, if any?

A. I don't know, sir. I have never been through there only on the train.

Q. Do you know how many orange trees are usually planted to the acre?

A. Yes, sir.

183 Q. How many?

A. Sixty to eighty, usually.

Q. That is the modern theory?

A. That is the way we plant them here. You can get them one hundred on an acre, but they have to be then about twenty feet apart to do it.

Q. In January, 1890, what was the value of the property occupied by the railroad, for rental value, per acre?

A. We never attach any rental value to any land like that.

Q. Could it have been rented for anything?

A. Only the small part that was cleared.

Q. I mean beyond that?

A. No, sir.

Q. Did you ever know that property to have been leased to anybody for any purpose?

A. No, sir.

Q. Do you know of any other property having been sold in that vicinity, for the past seven years, excepting this tract to Mr. Carter? Any other property in that vicinity?

A. No, sir. There was some sold at auction a couple of months ago by the Smith heirs.

Q. In what tract?

A. In that block where the Orphans' Home is.

Q. What difference is there in the value of property on Franklin street, and the continuation of that street in the reservation and the Bell tract; is there any comparison in value?

A. No, sir. I would say that residence lots would be worth about one-half what they are on the continuation of Franklin street.

184 Q. When you say that property is worth one thousand dollars an acre, do you think that that property today, or in July, 1896, could have been sold for one thousand dollars cash, the entire tract, per acre?

A. That is very doubtful.

Q. State to the court how you estimate that value. Or state whether or not that has not been the estimation of yourself, by buying that tract and cutting it up into lots and ultimately making a thousand dollars out of it.

A. Yes, sir. That is the only way we could estimate it.

Q. Would you, in July, 1896, have given one thousand dollars for that tract per acre?

A. I don't know how I would be about that.

Q. Well, would you have given seventeen thousand dollars for it?

A. That is too remote, $17,000.

Cross-examination:

Q. Where is Washington street relative to the property?

A. It is one street away from Whiting.

Q. North of Whiting?

A. Yes, sir.

Q. Wasn't that at one time the principal business street of this city?

A. Yes, sir.

Q. Any business done right now to speak of?

A. Very little, only one store there, I believe.

185 Q. When you speak of business, who do you refer to?

A. Retail and wholesale.

Q. Don't business of that kind usually go with the growth of the town?

A. Business usually goes with the population.

Q. Do you know that one reason why this property wasn't occupied, and why this town didn't extend southeast was because the title was in dispute?

A. It wasn't on the market.

Q. Wasn't that a fact well known in the community?

A. That is a fact.

Q. Your lots, I understand, were 51½ feet front, and you mean to be understood, that if you had charge of this property, with a good title, or with any title, safe for an occupant, that you could not have divided it up into lots one hundred feet, and advertised it for rent for anything?

A. Well, you don't find many people who build houses that way.

Q. Well, there are a great many people on this lot now? Now don't you think in the case I speak of, had the lots been advertised for two dollars a month, don't you think it would have had applicants?

A. According to what length of time, a man won't build a house on leased land for less than say ten years.

Q. You speak about this land being cleared, has it not all been cleared, the reservation part, any bushes?

A. I believe there are quite a number of trees and palmettoes.

Q. What kind, scrub palmettoes?

A. Saw palmettoes.

Q. Do you not know that this tract is exceedingly well adapted to vegetables, raising gardening truck?

186 A. Yes, sir; good truck land.

And the defendant, further to maintain the issues on its part, introduced as a witness, one JOHN S. MCFALL, who being duly sworn, testified as follows:

Q. You may state your name.

A. John S. McFall.

Q. Mr. McFall, do you live in the city of Tampa, and if so, how long?

A. Since ninety.

Q. What position, if any, do you occupy with the defendant in this city?

A. I am agent for the Florida Central and Peninsular Railroad Company.

Q. Were you the first agent here?

A. Yes, sir.

Q. Do you know the Bell tract in controversy?

A. Yes, sir.

Q. You may state, if you know, the exact condition of that tract, when the railroad first came over?

A. There was a small enclosure around the house, the balance of the tract was used, up to two years ago, as a cow pasture. Cattle grazed there and all over the reservation.

Q. What would you say the acreage of the enclosure was, if any?

A. I would say about two acres or acre and a half.

Q. Do you know the exact condition of the enclosure that was crossed by the track, whether any orange trees there, and if so, how many?

A. I think, I am not positive, I think one of the sectionmen said there was four or five there.

Q. On that part taken by the railroad?

A. Yes, sir.

187 Q. Do you know who put the fence up for the Bell heirs again?

A. The F. C. & P. railroad.

Q. And you say that about two years ago the balance of that tract was used as a pasture?

A. Yes, sir.

Q. All unoccupied, wild and unimproved?

A. Yes, sir.

Q. All the rest, except what the railroad took, was unoccupied and unimproved?

A. I don't remember of any cleared myself, only what Mr. Bell had enclosed there.

Q. Was there ever any garden outside of the Bell enclosure, except parts there in little patches by squatters?

A. No, sir.

Q. Do you remember when these squatters went on that tract, commenced going on—that is, that are there at the present time?

A. I think they commenced about a year after we came through, after the railroad was completed.

Q. Began to build houses?

A. Yes, sir.

Q. What was the character of the houses?

A. Just little cottages and small houses.

Q. Of any value?

A. No; not of any consequence.

Q. On what foundations were they generally built?

A. Built of wood.

Q. Mr. McFall, do you know the width of the tracks occupied by the railroad company, from ditch to ditch, from one side of lot eight to the other, and if so state it.

188 A. I never measured it, Mr. Knight, I think, though about fifty feet.

Q. How many tracks run across that entirely?

A. Four is my recollection.

Q. Not entirely?
A. No, sir.
Q. How many entirely across?
A. Three, I think.
Q. And one part of the way?
A. Yes, sir.

Cross-examination:

Q. You mean fifty feet from one embankment to the other?
A. Yes, sir.
Q. In what capacity did you represent this company, when this railroad was built over this lot?
A. Agent.
Q. What kind of agent?
A. Depot agent.
Q. Where?
A. Wildwood, Sumpter county,
Q. When did you come to Tampa?
A. I came here in April, 1890. I think it was about the third of April, 1890.
Q. Was the railroad then completed across this lot?
A. I am not positive. If not, very near it.
Q. Do you know the width of the right of way across this lot that the company surveyed?
189 A. No, sir. I do not.
Q. Your fifty feet then, only embraces the ground actually occupied by the track and the ditches?
A. Yes, sir.
By the COURT: Do I understand that means only the tracks?
A. From ditch to ditch.

And the defendant, further to maintain the issues on its part, introduced in evidence one I. S. GIDDENS, as a witness, who being duly sworn, testified as follows:

Q. Mr. Giddens, you may state your name?
A. I. S. Giddens.
Q. Mr. Giddens, how long have you lived in this city?
A. About fifteen years, I think.
Q. You may state what business? What business you have been engaged in and are in at the present time?
A. I am in the wholesale grocery business.
Q. Wholesale firm of I. S. Giddens and Company?
A. Yes, sir.
Q. Where is their place of business?
A. At the river.
Q. Foot of Jackson street?
A. Yes, sir.
Q. You may state whether or not you were ever in business in the proximity to the Bell tract on Washington street, and if so, how long?

A. Well, I was about twelve years I suppose on Washington street.

Q. About how many blocks from the Bell tract in controversy?

A. Just about two blocks.

190 Q. One block?

A. Yes, sir.

Q. State, if it is not a fact, that you are a property-owner in this city to a considerable extent?

A. Yes, sir. I own some property.

Q. You may state whether you have bought and sold property of your own here, for the last ten years?

A. Yes, sir.

Q. In all portions of the city?

A. In several parts, I have.

Q. In the vicinity of the Bell tract down there?

A. Yes, sir.

Q. You may state if you were acquainted with the values of property from 1890, down to the present time?

A. Probably as much so as a merchant would be.

Q. Have you not bought and sold property continuously of your own?

A. Yes, sir. Ever since I have been in the State.

Q. Did you know the value of the Bell tract in 1890?

A. No, I do not know the value of it exactly. I don't know that it had any value then, because there was no deeds to it, or anything, almost useless, only for gardening purposes.

Q. How much do you think that property would be worth in July, 1896, if the title to that property was perfect?

(Objected to because he had not qualified sufficiently.)

Q. Do you consider, Mr. Giddens, that you have bought and sold property, so as to have a general knowledge of the value of property?

A. Oh! yes, sir. I have a general knowledge of the value of property, all over the city, as I have dealt in most portions of the city.

191 Q. State then, what the value of that property was, in July, 1896, with the title to it settled.

A. Well, I suppose it was worth anywhere in the neighborhood of nine hundred to twelve hundred dollars an acre.

Q. (Producing map.) Looking on this map, that being Whiting street, this being towards the depot, which was the more valuable and which the less?

A. This the more valuable.

Q. This towards the depot, and getting less valuable, as it went away?

A. Yes, sir. Know from personal experience.

Q. Mr. Giddens, what was that property worth for ground rent for rental purposes, in January, 1890, and up to July, 1896, if anything?

A. Had some very good land around the house there for gardening purposes. I don't know the value of it though, as I never leased,

or had anything to do with property of that kind. It could only have been used though, I believe, for vegetable purposes.

Q. And what was it worth for vegetable purposes. Do you know what it was worth for vegetable purposes?

A. I do not know.

Q. Could it have been used for anything else but that?

A. Nothing but pasturing or farming purposes.

Q. Do you know of any cultivated tract on that land, except the Bell enclosure, in 1890, when the railroad first went on it?

A. I do not remember of any, no. None other than around the house of Mr. Bell's property.

192 Cross-examination:

Q. Mr. Giddens, did you, with others, have any contract with the railroad company at the time of the coming of the railroad here?

A. I think there was a contract. I paid one hundred dollars. I did it to help some other, that had a kind of a contract. I don't know what it was.

Q. You had no contract?

—. No, sir. I would not go into the contract. I did it to help my friends out.

Q. Your business in real estate has been buying and selling for yourself?

—. Yes, sir.

Q. Your principal business has been mercantile business?

A. Yes, sir.

Q. Made more money out of that than the mercantile business, I suppose?

A. No, sir; I didn't.

Redirect examination:

Q. Mr. Giddens, did the running of that railroad across that land increase or decrease the value?

A. I would naturally suppose it increased the value of the lots near the railroad there for business lots.

Q. What was the tendency of the growth of the city, prior to the running of this railroad over that tract?

A. Kind of moving away.

193 Q. What was the effect of the building of that railroad?

A. My brother owned some property at the corner of Franklin and Whiting, and I don't think he had ever gotten any rent out of it till the railroad came in. But since then he has been getting forty, fifty or sixty dollars.

Q. This improved property?

A. Yes, sir. And I think it was vacant until they came there.

Q. Do you know of any ground rent being paid in the vicinity of that tract for the last seven years?

A. No, sir.

Cross-examination:

Q. Wasn't Washington at one time the principal business street in this city?

A. Yes, sir.

Q. What time was that?

A. That was prior to the coming in of the South Florida railroad.

Q. That drew it up to the South Florida?

A. To the South Florida.

Q. Stopped where?

A. I don't remember what street it came in on, I am sure.

Q. Four or five streets north of here?

A. Yes, sir. North of the F. C. & P.

Q. Was Washington street abandoned long ago for business purposes?

A. Yes, sir.

194 Q. For residence purposes now, is it not?

A. There are two stores, I think, on Washington street now. There was not much business done here. There are pretty near as many stores on it now as there ever was. There was four; Knight and Wall left there two years before the F. C. & P. came in. I left. I had my business there about six years ago.

Q. Do I understand you that this part of the city is now desirable for residences, with a good title to the property, including this lot eight?

A. It is a desirable part for business along the railroad.

Q. Is not the property farther south desirable for business an residences? Is there not a beautiful river front?

A. Not very pretty. I don't think so.

Q. How about the place where the barracks are?

A. That is very pretty down there. I thought you meant back from the Bell property, southeast.

Q. I meant south.

A. Oh! yes, sir. Very pretty.

Q. You don't mean to be understood as having any recollection as to who was on that lot, except Mr. Bell?

A. I do not. I think Myers was on it. I don't recollect, though, when he settled there.

Q. You have no convictions, no judgment about the rental value of this property in 1890. Suppose, to illustrate, you had owned it in 1890, and the railroad had applied to you for a lease across it, what would you have considered a fair rental value?

A. Out of a railroad, I always would get all I could.

Redirect:

Q. What was the population of this town in 1883, approximately?

195 A. I suppose about twelve or fifteen hundred people.

Q. What is it now, approximately?

A. Twenty-five thousand.

Q. Why was business done mostly on Washington street in 1883 and prior to that time, and why is it not now? State the reasons.

A. The coming in of the South Florida. That drew the business away from us.

And the defendant, thereupon, further to maintain the issues on its part introduced as a witness one CHARLEY BALL, who being duly sworn, testified as follows:

Q. What is your name?

A. Charles E. Ball.

Q. Where do you live, Mr. Ball?

A. Tampa.

Q. What business?

A. Grocery.

Q. You the firm of C. E. Ball and Company?

A. Yes, sir.

Q. Are you a property-owner here, to any extent?

A. Not to any extent. I own some property.

Q. Own a brick building?

A. Own part of one on Washington street.

Q. How far from Bell tract?

A. One block from Whiting street. I don't know the exact location of the Bell tract.

Q. How long in this city?

A. Since January, 1893.

Q. Have you bought and sold property of your own in this city, during that time? And to such an extent that you are acquainted with the values of it?

196 A. Since 1893, I am only acquainted with the value of property from talking with other people, not having sold any.

Q. Did you not own that property opposite here at one time and sell it?

A. Yes, sir.

Q. Didn't you buy the property you are situated in?

A. Yes, sir.

Q. Didn't you buy other property here?

A. No, sir. Not except those two.

Q. From what you have bought and sold and from what you have heard others say, as to the value of that property, in what is the old town of Tampa, would you say that from 1893, to the present time, you are acquainted with the general values of property in that vicinity?

A. Yes, sir. The general values.

By the COURT: Have you made it a study or practice, or kept up with the values of property? Have you bought or sold in any way?

A. No, sir.

By the COURT: Then if you were going to ask him his opinion, I do not think it is the best evidence.

A. I have kept posted in the old parts of the town, but have not made it a business.

Q. Do you know of any lots in the vicinity of the Bell tract in the last seven years having been sold, commencing at Marion street and going on up Whiting street, in that vicinity? Do you know of any property that has been sold since 1893, commencing at Marion street and going the other way?

A. Yes, sir. Not positively, but very sure that I have
197 known of some. But could not state of any since I have been there.

Q. Do you know of any that has been leased?

A. No, sir. I don't.

And the defendant, further to maintain the issues on *their* part, introduced as a witness one GARRETT, who had previously been sworn in this cause, who testified as follows:

Q. How many acres in a tract of land, fifty feet wide, by 1,424 feet long?

A. About one and five-eighths approximately.

Cross-examination:

Q. Suppose the right of way was two hundred feet wide by 1,424 feet long?

A. Six and one-half.

By Mr. KNIGHT: For the purpose of showing the good faith of the defendant, in entering this tract, I offer in evidence the chancery files in the injunction suit of Mrs. Louisa Bell *et al. vs.* the defendant.

Counsel for plaintiff objects, on the ground that it would be encumbering the record, and immaterial if either party should wish to take the case to a higher court.

The court sustains the objection, inasmuch as there is no claim for vindictive damages, and the court does not consider the claim of good faith in entering at issue.

To which ruling of the court the counsel for defendant objects and excepts to the ruling of the court.

The following are the chancery files:

198 In the Circuit Court of the United States, Fifth Judicial Circuit, Northern District of Florida.

MRS. BELL, WIDOW, ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR Railroad Company. } Bill for Injunction.

Personally came D. E. Maxwell, who, being duly sworn, says that he is the general manager of the defendant, The Florida Central and Peninsular Railroad Company, and resides at Fernandina, Florida and is forty-six (46) years of age, and has been engaged in the management of railroads as a profession for twenty years.

That the said company is a corporation organized under the laws of Florida, and a citizen of said State, and owns and operates a line of railroad five hundred and seventy-five (575) miles in length in said State, and having connections by rail between, among other points, Waldo, in the county of Alachua, in the northern district of Florida, and Plant City, in the county of Hillsborough, in the southern district of Florida, and said company has an agent in Plant City, in Hillsborough county, and at Dade City, in Pasco county.

That the said line of his company's railroad is on the line indicated under the laws of Florida of January 6th, 1856, and the act of Congress of May 17th, 1857, as a part of the line of railroad to be constructed thereunder between Amelia island and the waters of Tampa bay.

199 That in order to complete the line of its railroad, and to prevent a threatened act of forfeiture of its land grants, and to prevent therefrom a cloud upon the title to its land already earned, as also to complete its line of railroad and discharge its obligations to the public under the contract of its charter, it has contracted with W. Scott Walker & Co. to construct a continuation of its line of railroad from Plant City aforesaid to Tampa bay.

That the contractors have begun said work, and have been so engaged for about ten days.

That about four or five miles of railroad beginning at Plant City has been graded in the direction of Tampa, and the contractors are now at work with a large force of hands.

That it is expected that said work will be completed to the waters of Tampa bay at Tampa by February 10th, 1890.

That this line of construction is located across and upon that part of the public domain which was once the Fort Brook military reservation at Tampa, but now alleged to have been turned over to the Interior Department for disposition under the laws governing the same.

That its line as located is the only practical way of entering the said city of Tampa with a railroad, and having therefore the necessary room for its side tracks, warehouses and depots and other conveniences necessary and essential to the operation of a railroad.

That said land covered by its location is absolutely essential to the use of his company in the operation and maintainance of its railroad, and that it is not possible to enter said city to the

200 points accessible to the travel and commerce of said city by any route other than the line as located on or across said lands.

That there are many contests over the right to enter and purchase said reserved land, several parties having prior rights, time and diligence considered, over this complainant, and that no decision on the merits of the several contestants has been made by the executive officers of the Government. And neither the complainant nor any other claiming rights of entry to such land or part thereof has been recognized by the Land Department of the Government.

That they cannot be negotiated with for right of way thereon.

D. E. MAXWELL.

Sworn to and subscribed before me this December 6th, 1889.

[SEAL.] L. W. GUERNSEY,
Notary Public.

Jacksonville, Fla.

In the Circuit Court of the United States, Fifth Circuit and Northern District of Florida.

MRS. LOUIS BELL, Widow, ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR Railroad Company. } Bill for Injunction.

John W. Bushnell, being duly sworn, says that he is a civil engineer by profession, and has been engaged in such business
201 for more than fifteen years last past. That he is the chief engineer of The Florida Central and Peninsular Railroad Company, the above-named defendant, and that he located its line of present construction between Plant City and Tampa; that he has read the affidavit in this cause made by D. E. Maxwell this day and hereto attached, and knows the contents thereof; that the statements therein made are true.

J. W. BUSHNELL.

Subscribed and sworn to before me this December 6th, 1889.

[SEAL.] L. W. GUERNSEY,
Notary Public.

Jacksonville, Fla.

The endorsements on the back thereof are as follows: In the U. S. circuit ct., northern district of Florida. Mrs. Louis Bell *et al. vs.* Fla. C. & P. R. R. Co. Affidavit- — D. E. Maxwell and J. W. Bushnell. Filed Dec. 9th, 1889. Philip Walter, clerk. Filed this 21st day of. January, A. D. 1890. H. L. Crane, deputy clerk, southern district of Florida.

In the Circuit Court of the United States in and for the Northern District of Florida. In Chancery.

MRS. LOUIS BELL, Widow, ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR Railroad Company. } Bill for Injunction.

STATE OF FLORIDA,
County of Duval.

John A. Henderson, being duly sworn, says that he is a
202 lawyer by profession, 48 years of age, and resident at Tallahassee, Florida. That he is the general counsel of the defend

ant, The Florida Central and Peninsular Railroad Company, hereafter called the company, who, as such general counsel, is referred to in the paragraph 5, of complainant's bill of complaint. That he resided at Tampa, which is contiguous to the lands which were of the Fort Brooke reservation from 1845 to 1876. That during all those years he knew the deceased Louis Bell, and was acquainted with his residence on said land. The said reservation in the early parts of those years extended much beyond its present limits, and there resided on various parts of the reservation many squatters, or settlers, composed largely of discharged soldiers from the regular army, of which class was the said Louis Bell. The reservation was then and afterwards, with the exception of short intervals, occupied by the troops of the United States Army up to 1860, and from the termination of the war in 1865 for some ten or twelve years as a regular post, and at other times since for the temporary occupancy of troops during the epidemic season from the forts at and near Key West. That during said occupancy, a residence on the said reservation by citizens was only an indulgence extended to favored persons. And there *was* occasional forcible removals by the military authorities of settlers rendering themselves obnoxious from such reserve.

That no person was permitted to occupy said reserve, holding or claiming to hold by right of occupancy or adverse to military holding any part of said reserve. And that such was the character of the holding and the occupancy of the said Louis Bell, whose dwelling-house and grounds consisting of an enclosure of not more than five acres *was* on a portion of said reserve. That such continued to be the situation of said residence and all residences on said re-
203 serve up to the time of the abandonment of the same by the War Department and its transfer to the Interior Department. That being advised at Tallahassee by telegram from Tampa, of the order of the Interior Department that the lands of what were this reserve would be open for disposition on a certain day, which notice reached the deponent on the day that the same would be so opened at Gainesville, Florida; deponent some three or four days afterwards repaired to Gainesville and to the local land office of the Government, there situate for the purpose of attempting the entry of said lands. That arrived at Gainesville, he found that already an entry under the homestead laws of the United States had been allowed to one Dr. E. Carew, and a certificate of entry thereon had issued to him covering said reservation, and all that claimed by complainants, and that an offer for cash entry of said land had been made by one J. A. Carlisle, and the money received by the land officers at such land office for such entry, and a receipt given therefor. That the said Carew settled upon the land under his entry, died, and his widow is now occupying the same and claims to be duly perfecting a legal title thereto. That defendant then applied to enter the same and tendered in payment therefor, a script, known as "soldiers' additional bounty land script." That this entry was denied him. But to make a test case he deposited his script with his application and appealed from the decision of the register and receiver declining to allow his entry, to the Secretary of the Interior.

That after this transaction, and before quitting the land office, deponent saw Thomas Bell, son of the said Louis Bell and one of the complainants, then more than 21 years of age, entering the office, and on information then received from the said land office he states that the said Thomas Bell then for the first time, attempted to secure the entry of the same lands and was denied in the same
204 manner that deponent had been, and as advised the rejection and refusal of said local land officers to recognize the right of entry *of entry* of the said Louis Bell or of any of the complainants to these lands has never been reversed or set aside by any authority of the United States. That there *has* also been placed on said lands the claims of the heirs or representatives of one Belknap, claiming settlers' or occupants' rights to said lands dating back prior to 1830. Also the city of Tampa to the same as a part of their city covered for years by its corporate jurisdiction and of certain parties who under advice of counsel learned in the law have located on these lands various forms of script issued by the United States and locatable on any Government lands, as for instance the Girard land script, also divers other claims made by other settlers to the whole of various subdivisions of this land, as by Clifton Herrick, one Frank Jones, one Nelson, and many others whose names are unknown to deponent, as is also the time and manner of asserting their various claims. That becoming tired of the contest and wholly uncertain whether any and if so which of the various contestants would establish a title to said land, under their respective claims, he withdrew his application for entry and the script deposited therewith, for the purpose of realizing on the same, and it is not true as alleged in the bill of complaint the defendant company was advised through its general counsel that the complainants are claiming a legal title to and are duly homesteading their claim to a legal title to said lands. And deponent does not believe that said company was otherwise so informed nor does it believe that such is the fact. And further that he is acquainted with the route or line of the proposed line of railroad of the defendant company through said reserve and that said line passes through the claims of at least six and perhaps more squatters and the claim on which they squat, and which they now occupy, and which they by reason thereof make a claim to the whole or large portions of said lands and on and covering
205 which over such and the whole of this land divers and sundry claimants who each like the complainants allege a legal claim to said lands and that they are prosecuting diligently their claims to a legal title thereto.

JOHN A. HENDERSON.

Sworn to and subscribed before me this 6th day of December, A. D. 1889.

[SEAL.] EUGENE B. McBRIDE,
Notary Public, State of Florida at Large.

Endorsements on the back thereof are as follows: In the United States circuit court, northern district of Florida. In chancery.

Mrs. Louis Bell *et al. vs.* Florida Central and Peninsular Railroad Company. Affidavit of John A. Henderson. Filed December 9th, 1889. Phillip Walter, clerk. Filed this 21st day of January, 1890. H. L. Crane, deputy clerk, southern district of Florida.

In the Circuit Court of the United States, Southern District of Florida.

MRS. LOUIS BELL ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD Company. } In Equity.

The defendant will please take notice that application for
206 injunction will be made to his honor Judge Pardee, at chambers, in Jacksonville, on Friday, December 13th, at 10 o'clock a. m., or as soon thereafter as the case can be heard, on the grounds stated in the bill, which is identical with the bill filed in the northern district of Florida and dismissed, and affidavits and other documentary evidence in support thereof.

H. BISBEE,
Solicitor for Complainants.

To John A. Henderson, solicitor for defendant.

This notice served on me December 16th, '89, at 5 p. m.
JOHN A. HENDERSON.

The endorsements on the back thereof are as follows: In the circuit court of the United States, southern district of Florida. Mrs. Louis Bell *et al. vs.* Florida Central and Peninsular Railroad Company. Notice of application for injunction. Filed this 21st day of January, A. D. 1890. H. L. Crane, deputy clerk. H. Bisbee, solicitor for defendant.

To the honorable the judges of the circuit court of the United States for the southern district of Florida:

Mrs. Louisa Bell, widow of Louis Bell, Miss E. A. Bell, Thomas J. Bell, John W. Bell, Matilda P. Fiehe, William J. Bell and Frank A. Bell, heirs of and children of the said Louis Bell, deceased, exhibit this their bill of complaint against the Florida Central and Peninsular Railroad Company, a corporation, organized under the laws of the State of Florida, and doing business in said State having its principal office in Jacksonville, Florida, and therefore your orator and oratrices complain and allege as follows:

I.

That prior to about the month of March, A. D. 1883, a
207 certain tract of land, situated near and adjoining the town of Tampa, Florida, was a military reservation, and was made and created such reservation in accordance with the laws of the Government in such cases made and provided; and that about the

time aforesaid the Government duly relinquished the right and claim to said land as a military reservation in conformity to laws in such cases made and provided; that such reservation was known as the Fort Brooke military reservation; that at the time of said relinquishment and for a long time prior thereto, to wit: for twenty years, one Louis Bell resided and made a settlement in person on said land and inhabited the same with his family, consisting of a wife and several children, and erected a dwelling thereon, cultivated and improved portions thereof; that since the death of said Bell, which occurred on the — day of November, A. D. 1885, the complainants or some of them have resided on said land, and continued and still continue to occupy, inhabit and improve the same; that about the time of said relinquishment by the Government of its claim to said land, as such reservation, the said Louis Bell, then residing thereon as aforesaid, and but a few days after such relinquishment, duly made and filed in the local land office at Gainesville, Florida, a decla-tory statement duly asserting his claim to said land and his right to purchase the same under the laws known as the pre-emption laws of the United States Government, and subsequently and within the time allowed by law duly offered to the register and receiver of said office, to make due proof of such settlement and all his rights as a pre-emption claimant to said land in accordance with the laws of said Government, which offer was illegally and wrongfully refused by said register and receiver and by them said Bell was denied illegally the right to make such proof; that the dwelling-house of said Bell and his heirs is upon lot eight of said land, according to the survey and plat thereof filed in the land office after said relinquishment in 1883.

208 That afterwards and within the time allowed by law the said Louis Bell in person, or by his authorized agents, duly tendered the money in the currency of the United States *to* the register and receiver aforesaid, due for said lands at the rate per acre prescribed by law *in* respect to title by pre-emption, and demanded of said land officer a final receipt and certificate therefor, entitling him, the said Bell, to a patent for said lands, and that the said land officer illegally refused to accept the money as tendered for said lands and to give and deliver to said Bell his final receipt and certificate aforesaid.

That since the death of said Louis Bell, complainants have endeavored to obtain from the said land office such final receipt and certificate, and have always been willing and anxious and have offered to do all things required of them on their part by law to obtain such certificate.

III.

That the said land officers refused to receive proof of settlement and other proofs aforesaid and the money aforesaid, and to give the aforesaid receipt and final certificate and patent aforesaid, on the pretense that said lands were not subject to sale, disposal and purchase under the pre-emption laws of the United States, though the act of Congress of August 18th, 1856, expressly declared that *when*

after such relinquishment by the Government said lands should become a part of the public domain and be subject to sale and to be disposed of like any other part of such domain.

IV.

That subsequent to said offer, tender and illegal refusal, hereinbefore occurred, the acting Secretary of the Interior held and decided in a written opinion that said lands were subject to sale and disposal under the pre-emption and homestead laws of the United States and the said Interior Department made such direction
209 to the said officer at Gainesville land office, that said officers have recently, to wit: within the last month, received the proof of the said settlement, residence and compliance in all respects with the said pre-emption laws, and proof of the alleged rights of other claimants to said lands, or portions thereof, that complainants are duly prosecuting their said claims to said lands for the purpose of obtaining a legal title thereto before the officers and tribunals created by law to have and determine such claims and verily believe they have a right to and will in due course of time and of official action obtain a patent for said lands from the said Government, as in equity they deserve to have according to the pre-emption laws of the United States; that the said tract of land is of great value and largely exceeds the value — five thousand dollars.

V.

That the defendant, hereinafter termed the defendant company, being fully advised through its general counsel and otherwise that the complainants are claiming a legal title to and are duly prosecuting their claim to a legal title to the said lands utterly disregarding the premises and the rights of complainants hereinbefore noted, has within the past ten days willfully and maliciously commenced to trespass upon said lands, and after being warned off said lands and not-fied of complainants' claims and rights by them, has recently, within ten days commenced the construction of a railroad through said lands and with a force of laborers has entered upon said lands and has commenced to cut and dig and is now cutting and digging said lands and constructing a road-bed through said lands with the avowed intent and purpose of extending its railroad through said lands and of running its trains of cars through the same, all of which is against the protest and remonstrances of complainants and illegal and wrongful.
210 That said defendant company pretends that it has a right to construct its road through said lands under some law of the United States, whereas in truth and in fact the said company has no title whatever to said lands nor a right of way over said lands under any laws of the United States, and never did have. Complainants aver that defendant company has broken and torn down fences enclosing portions of said lands of theirs, against their remonstrance and protest.

VI.

That the said Louis Bell and wife, in his lifetime, and complainants, or some of them, settled on said lands as hereinbefore stated long prior to January 1st, A. D. 1884, and on that date were actually occupying said lands in good faith for the purpose of securing a home and of entering the same under the general laws, and have continued in such occupation of said lands up to the present time; and the said Louis Bell was, on and prior to the date aforesaid, and his said widow since his death, was and is entitled in fact and law, as the head of a family and otherwise in all respects, to make a homestead entry under the laws of the United States, and the said widow, one of the complainants, and complainants, as the legal heirs and children of said Louis Bell, are entitled to enter said lands at the said local land office, not exceeding 160 acres, under and by virtue of the pre-emption laws aforesaid, and especially under the act of Congress expressly conferring such right of entry and purchase, approved July 5th, 1884, session 1st, ch. 214 of the Laws of the 48th Congress, and are ready to pay the money due therefor, heretofore tendered, when said land officer will receive it, which complainants very truly and in good faith believe will be in a very short time, and aver that they have made the requisite proofs of their rights in
211 the premises in said local land office, and that the same is now being considered, and that a decision will be rendered thereon in a short time, and complainants aver that said lands, when so relinquished, were subject to the right of pre-emption under section 2257 of the Revised Statutes of the United States and the said act of Congress of August 18th, 1856, and were subject to entry under the pre-emption laws aforesaid prior to and at the time of the withdrawal of said lands from said sale and disposition by reserving them for such military reservation. Your orators and oratrices aver that the said tract of land includes within its extensive boundaries less than one hundred and sixty acres, to wit, about one hundred and fifty-three acres.

All which actings and doings on part of the defendant company are contrary to equity and good conscience and tend to the manifest wrong and injury of complainants.

In tender consideration thereof, and inasmuch as complainants have no adequate remedy at law, and can only have adequate relief in a court of equity where such matters are properly cognizable and revicwable. To the end that the said defendant may if it can show why your orator and oratrices should not have the relief herein prayed, and may under its corporate seal and under the corporate oath of its president or other principal officer, full true, direct and perfect answer make and according to the best and utmost of defendant's knowledge, remembrance and information and belief, to such of the interrogatories hereafter contained, or by a note hereunder written, it is required to answer, that is to say:

Int. 1st. Whether or not Louis Bell made his declaratory statement, claiming said lands under the pre-emption laws of the Government, as stated in the bill and if not, how otherwise.

Int. 2nd. Whether or not Louis Bell offered to make proof of settlement and payment of said lands as stated in the bill,
212 and the officer of the Gainesville land office refused to receive such proof and payment and to issue to him, or complainants a certificate of purchase and if not how otherwise.

Int. 3rd. Whether or not the Government relinquished all claim to said land as a military reservation in the spring of A. D. 1883, as stated in the bill, and if not how otherwise.

Int. 4th. Whether or not the officers of the Gainesville land office have under instructions from the General Land Office of the United States recently been engaged in receiving and taking evidence on the part of complainants to establish their right to a patent to said lands as alleged in the bill.

NOTE.—The defendant company is required to answer all of said interrogatories.

And may it please *to* the court to perpetually enjoin the defendant company, its officers and agents from further trespassing upon the lands of complainants, described in the bill, and from entering and constructing and operating a railroad through the lands and premises aforesaid, and by a temporary writ of injunction enjoin the said defendant as it is herein prayed it m-y be perpetually enjoined, and for such other and different relief as to this honorable court may seem just and equitable and complainants will ever pray, etc.

And may it please the court to grant to complainants its most gracious writ of subpœna, directing the defendant, The Florida Central and Peninsular Railroad Company, commanding it upon a certain day, and under a certain penalty therein designated, to be and appear before this honorable court to answer the
213 premises, and to stand and abide by such further order *of* the court in this behalf may have considered and complainants will ever pray.

H. BISBEE,
Solicitor for Complainants.

December 10th, 1889.

Endorsed on the back thereof as follows: In the circuit court of the United States, southern district of Florida. Mrs. Louis Bell *et al. vs.* The Florida Central and Peninsular Railroad Company. Bill for injunction. Filed January 21, 1890. H. L. Crane, deputy clerk. H. Bisbee, solicitor for complainants.

In the Circuit Court United States, Southern District of Florida.

MRS. LOUIS BELL ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

Personally appeared before me, J. A. Carlisle, clerk of the circuit court in and for said county, James Bell and Benjamin Rush, who

being duly sworn, say that they are citizens of the State of Florida, residing in Gainesville, Florida; that they know that Louis Bell, on or about the 30th day of March, 1883, and a few days after the lands known as the Fort Brooke reservation near Tampa, Florida, *was* relinquished by the Government as such reservation, file-
214 his declaratory statement in the Gainesville land office, alleging settlement on said lands, and claiming the right to enter the same under the pre-emption laws of the United States, and subsequently offered to the officers of said land office, and within the time allowed by law, proof of such settlement, and offered and tendered performance to said officers of every act, fact, and thing required by said pre-emption laws, to entitle him to enter and receive a patent for said lands, with which laws those affiants say they are familiar. Deponents further say that they know of their own knowledge that long prior to said relinquishment the said Louis Bell resided upon, inhabited, and had a dwelling-house upon said lands, and cultivated and improved parts thereof, and continued to inhabit and reside on said lands with his wife and children, and to cultivate and improve the same up to the time of his death, which occurred some time about the month of November A. D. 1885, and that since his death complainants, or some of them, heirs of said Bell and his said widow, have continued to inhabit, reside upon, cultivate, and improve said lands for the purpose of making and having a home thereon and have never ceased to reside upon, inhabit, and improve and cultivate said lands or part thereof, and have on their part offered to the officers of said Land Department, to perform all and every act, fact, and thing required of them under the laws aforesaid; that said offer and performance by the said Louis Bell, and since his death by complainants, were refused by said officers, except as hereinafter stated on the alleged grounds that said lands were not subject to entry under the pre-emption laws of the United States; that recently and within the last month said officers have received proofs of such settlement of the said Louis Bell and residence, occupation, cultivation, and improvements thereon by the said Bell, and the complainants since his death, together with the proof of claims of other individuals, to parts of said lands, and
215 said proofs are now being considered by the said officers with the view of rendering their decision on sworn claim and making their report thereon to the General Land Office at Washington, D. C., in the usual and regular course of business; that said tract of land, as so aforesaid claimed by the said Louis Bell and his said widow and heirs, contains less than one hundred and sixty acres, and exceeds in value the sum of five thousand dollars.

JAMES BELL.
BENJAMIN RUSH.

Sworn to and subscribed before me on this 27th day of November, A. D. 1889.

J. A. CARLISLE,
Clerk Circuit Court,
Per E. C. WIMBERLY, *D. C.*

The endorsements thereon are as follows: In the circuit court United States, northern district of Florida. Mrs. Louis Bell *et al. vs.* Florida Central and Peninsular Railroad Company. Affidavit of James Bell and Benjamin Rush. Filed this 21st day of January, A. D. 1890. H. L. Crane, deputy clerk. H. Bisbee, complainants' solicitor.

In the Circuit Court United States, Northern District of Florida.

MRS. LOUIS BELL, E. A. BELL, ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR R. R. COMPANY.

Personally appeared before H. L. Crane, deputy clerk, U. S.
216 circuit court, for the southern district of Florida, E. A. Bell and Thomas Bell who being duly sworn, depose and say: That at the time and long prior to the relinquishment by the Government of its claim to the lands embraced in the Fort Brooke military reservation, as such reservation, which relinquishment occurred on or about the month of May, 1883, Louis Bell, the father of deponents, resided on, inhabited, had a dwelling-house on, and had improved and personally lived upon with his family, the lands aforesaid, and after such relinquishment, continued to inhabit, reside on, cultivate and improve and occupy said lands, up to the day of his death, which occurred on the 21st day of November, A. D., 1885, and since his death his widow, Mrs. Louis Bell and the other complainants or some of them have continued to reside upon, inhabit, cultivate and improve said lands and occupied the same in good faith for the purpose of establishing a home thereon, as their said father did in his lifetime up to the present time; that immediately after said relinquishment, said Louis Bell filed in the land office at Gainesville, Florida, his declaratory statement, alleging a settlement on said lands and other things in accordance with the pre-emption laws of the United States, and subsequently offered to the officers of the United States Land Office proof of such settlement and offered and tendered performance to said officers of every act and thing required by law of him as such pre-emption claimant, which offer of proofs and tender of performance said officers refused to receive, on the pretence that the said lands were not subject to entry, under pre-emption laws; that since such request said officers have, to wit, within the past month, received and taken proof of such settlement, and of complainants' rights to enter said lands under said pre-emption laws, and that complainants are duly prosecuting before said officers of said land office their claim to enter said land as aforesaid, and have complied and tendered compliance with the laws of the United States in such case made and
217 provided; that the Florida Central and Peninsular Railroad Company through its officers and agents have and are trespassing upon said lands, and have cut out and dug therein a right of way and road-bed through said lands, and through complainants'

enclosure thereof, and threatened and avowed its intention to construct and operate its railroad through the said lands and enclosure.

Deponents further say that the officers and agents of said company were before such trespasses were committed, warned not to trespass as aforesaid on said lands and notified of the rights of complainants, under the pre-emption laws of the United States which confer and vest right- and equitable interests in said lands, upon and in complainants' bill alleged.

E. A. BELL.
THOMAS BELL.

Subscribed to and sworn to before me this 27th day of Nov., A. D. 1889.

H. L. CRANE,
Deputy Clerk, U. S. Circuit Court,
Southern District of Florida.

The endorsements thereon are as follows: In the circuit court United States, northern district of Florida. Mrs. Louis Bell *et al. vs.* Florida Central & Peninsular Railroad Company. Affidavit- of E. A. Bell and Thomas Bell. Filed this 21st day of January, A. D. 1890. H. L. Crane, deputy clerk. H. Bisbee, complainants' solicitor.

218 In the Circuit Court of the United States, Southern District of Florida.

MRS. LOUIS BELL ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

Personally appeared before me, H. L. Crane, deputy clerk, U. S. court, Miss E. A. Bell and Thomas J. Bell, who being duly sworn, depose and say that they are the children and legal heirs of Louis Bell, who died on the 21st day of November, 1885. The said Louis Bell, in the spring of 1883, to wit, about the first day of April, A. D., of that year, filed in the land office in Gainesville, Florida, his declaratory statement, alleging settlement on about 155 acres of land, situate near the city of Tampa, Florida, and which land prior to that time had been a military reservation of the Government of the United States; and said declaratory statement was in due form and in compliance with the laws of the United States, as these affiants are advised as an initiatory step to secure title to the said lands under the pre-emption laws of the said Government. That afterwards and within the time limited by said laws for this purpose, the said Louis Bell offered and tendered to the receiver and register of said land office due and sufficient proof of a settlement, occupation, habitation and dwelling on said land and improvement of parts thereof, and tendered to said officers through his agents, sufficient money to defray the expense of advertising the time and place, to wit: at said land office, when such proof would be made

in accordance with the laws and rules of the General Land
219 Office, giving said officers and duly offered and tendered performance of every act, cause or thing necessary or required to be done, on his, the said Louis Bell's part, to entitle him to his final certificate of purchase of said land and a patent thereto, all of which said offers, tenders and proofs, the said land officers refused to receive, admit and take, on the alleged ground that the lands aforesaid were not subject to entry and purchase under the laws of the United States. Deponents further say that complainants in this suit, or some of them, have continued to the present to reside upon, inhabit, improve and occupy the said lands, and are, as they are advised, the equitable owners thereof. That recently, to wit, within the last month, complainants have made proof of the settlement aforesaid of their father's, which proof has been taken before said land office under direction of the Secretary of the Interior and Commissioner of the General Land Office, which said proof, the deponents are advised, is sufficient in law to establish their claim to said lands, and which is now being considered by the officers, to wit, the receiver and register aforesaid. That recently, to wit, within the last month, the Florida Central and Peninsular R. R. Company, through its officers and agents, have commenced to construct a railroad through the lands aforesaid, and have broken into the enclosure of complainants, of part of such lands, and have dug and cut the same and otherwise commenced to grade its road through and on the same, against the protest and remonstrance of some of complainants, and still persist in doing so, and avowed and declared its intention to construct a railroad through said lands, and in utter disregard of the possession, right of possession to and equitable rights of complainants in said land. And said company, through its officers, can build its railroad to the waters of Tampa bay without going through said lands, and without damaging or in-
220 juring complainants' property aforesaid if it chooses to do so.

E. A. BELL.
T. J. BELL.

Sworn to and subscribed before me this 11th day of December, 1889.

H. L. CRANE,
Deputy Clerk, United States Court,
Southern District of Florida.

The endorsements thereon are as follows: In the circuit court, United States. Mrs. Louis Bell and others *vs.* The Florida Central and Peninsular R. R. Co. Affidavit of A. E. Bell and Mrs. Bell. Filed this 21st day of January, A. D. 1890. H. L. Crane, deputy clerk.

In the Circuit Court of the United States, Northern District of Florida.

MRS. LOUIS BELL ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR R. R. Co.
} Affidavit of James Bell.

Personally appeared before me, J. A. Carlisle, clerk of the circuit court for Alachua county, James Bell, Esq., who being duly sworn, says, that he resides and has resided for several years in the
221 city of Gainesville, Florida; that he was for about eight years, an employee, clerk and agent of the General Land Office at Washington, and familiar with the public-land system and surveys; that he was personally acquainted with Louis Bell in his lifetime, and personally knows several of his children, who are complainants in this suit, though he is not related to them, nearly or remotely, to his knowledge; that he, this deponent, has been in the city of Tampa, Florida, and was in said city and upon the lands known as the Fort Brooke military reservation, during the lifetime of the said Bell, and saw the said Bell, who then resided upon said lands with his family. This deponent knew from personal conversations with the said Louis Bell, and from other sources of information that the said Louis Bell was, while the Government had military forces stationed on said military reservation, in the employment of said Government, having duties to perform as such employee, under the command of the officers in command of the military forces at Tampa and on said reservation, and that he, the said Louis Bell, became and was a great favorite with said officers, who encouraged him to believe that when the Government ceased to use said lands as a reservation, he would be able to acquire the legal title to said lands; that the papers attached to this affidavit marked "Exhibits A, B," are true copies of letters from the office of the Secretary of War at Washington, to said Louis Bell, and that by such encouragement and by said letters, he, the said Bell, was led to believe he could obtain title to said lands, and remained and resided thereon for that purpose, until the Government relinquished such lands as such reservation, when he immediately took the proceedings required by statute to obtain title under the pre-emption laws of the United States.

Deponent further says that the paper hereto attached, marked Exhibit "C," is a true copy of said Louis Bell's declaratory
222 statement, alleging settlement on said lands, the original of which is on file in the local land office, of the United States, at Gainesville, Florida.

Deponent further says that he is familiar with the typography of the country, embracing the city of Tampa and the reservation aforesaid, and that the railroad, which the said defendant company is constructing through said lands is not located on the line designated on the map of definite location of said railroad, filed in the Department of Interior (under the act granting lands to the State of

Florida, to aid in constructing a railroad from Amelia island to *to* the waters of Tampa,) by the Florida R. R. Company, originally chartered to build said railroad, of which the defendant company is successor, in respect to the said land; that said defendant company has departed from said line and is building its road south of said line of definite location, which throws the line of road, so being constructed over the lands of said reservation, which the said original line did not touch at all; and this deponent says that it is wholly unnecessary for defendant company to pass through the enclosed lands, in the occupation of said complainants, and other lands claimed by them and the said pre-emption laws, in order to extend their road to the waters of Tampa bay, from Plant City, or from any point north of Tampa that said company can conveniently reach the waters of Tampa bay, with its railroad, without passing through said enclosed and other lands claimed by the said complainants as aforesaid, and without injury or damage to said lands, which have become, by the increase in population, and construction of the Florida Southern railroad and the South Florida railroad to Tampa, of great value, and that neither of the latter roads pass through the said enclosed lands and the said other lands of said complainants.

JAMES BELL.

223 Sworn to and subscribed before me this 4th day of December, A. D., 1889.

J. A. CARLISLE,
[SEAL.] *Clerk Circuit Court.*

Endorsements on the back thereof are as follows: In the circuit court U. S., N. D. Fla. Mrs. Bell *et al. vs.* The Fla. C. & P. R. R. Company. Affidavit of James Bell. Filed this 21st day of January, A. D. 1890. H. L. Crane, deputy clerk.

EXHIBIT "A."

WAR DEPARTMENT,
WASHINGTON CITY, *October 13th*, 1873.

Mr. Louis Bell, Sr., care of Frank W. Sanborn, assistant superintendent N. R. land, Tampa, Florida.

SIR: The department has received the letter of Mr. Sanborn dated August 6, 1873, requesting that you be permitted to live on the United States military reservation, at Tampa, Florida, and it appearing that there is no objection thereto, the authority requested is hereby given and you will be permitted to reside on said reservation until further orders.

Very respectfully, your obedient servant,

WILLIAM W. BELKNAP,
Secretary of War.

(Endorsement on the back thereof as follows:) Register and receiver U. S. land office, Gainesville, Fla., —— —, 1888.

224 EXHIBIT "B."

WAR DEPARTMENT,
WASHINGTON CITY, *August 20th*, 1878.

SIR: I am in receipt of your communication of June 7th last, in which you manifest uneasiness regarding the continuance of the privilege accorded you by this department in 1873, to occupy certain land now embraced within the Fort Brooke military reservation, and request a title to said land, and beg to inform you in reply that the executive has no authority to grant you a title to the land, but you are permitted to remain on the military reservation until further orders.

Very respectfully, your obedient servant, —— ——.

Endorsed on the back as follows: Geo. W. McCrary, Secretary of War. Mr. Louis Bell, Sr., Tampa, Florida.

(534.) EXHIBIT "C."

Declaratory statement of a settler on lands subject to private entry at the date of settlement required by the 15th section of the act of 4th September, 1841, for cases where, at the date of the law, the land claimed was subject to private entry.

225 I, Louis Bell, Sr., of Tampa, Hillsborough Co., Fla., being a qualified pre-emptor, have, since the first day of June, 1840, to wit, on the twenty-fifth (25th) day of March, A. D. 1838, settled and improved the lots 8, 9 and 10, section 24, township 29, south, range 18, east; lot 16, section 18, and lots 12, 13 and 14, quarter section number 19, in township number 29, south of range 19 east, in the district of lands subject to sale at the land office at Gainesville, Fla., and containing 148.11 acres, which land was subject to private entry at the passage of the act of the 4th of September, 1841; and I do hereby declare my intention to *to* claim the said tract of land as a pre-emption right under the provisions of said act of 4th September, 1841.

Given under my hand this — day of March, A. D. 1883.

LOUIS BELL, SR.

In presence of—

—— ——.

Filed in the U. S. Land Office March 30th, 1883.

In the Circuit Court of the United States for the Northern District of Florida.

MR. LOUIS BELL'S WIDOW and Others
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

Be it remembered that on this 9th day of December, A. D. 1889, before the subscriber, a notary public for the State of Florida at

large, personally appeared John T. Lesley, W. B. Henderson, Wm. C. Brown, and Josiah Ferris, who, being duly sworn, severally
226 say that they are residents of the city of Tampa, Florida, and are familiar with the Fort Brooke military reservation, embraced within the corporate limits of said city, consisting of lots 12, 13, and 14, of section 19, and lot 16 of section 18, township 29, south of range 19 east, and lots 8, 9, and 10 of section 24, township 29, south of range 18 east; that said military reservation was, on or about the 18th day of March, A. D. 1883, abandoned as a military reservation and turned over to the Interior Department as a part of the public domain; that on or about the 22nd day of March, A. D. 1883, one Edmond S. Carew, filed in the land office at Gainesville, Florida, a homestead entry on said lands, and that about the same time one Julius A. Carlisle, filed a cash entry in said land office for said land, and that afterwards and during the year 1883, Louis Bell, Sr., Clifford Herrick, Daniel Mather, Julius Cæsar, Frank Jones, and others, filed declaratory statements in said land office for the purpose of pre-empting the said lands; and that afterwards and before the commencement of this suit declaratory statements for pre-emption of said lands were filed by E. B. Chamberlain, M. M. Nelson, George W. Kirby, and a number of others; that on or about the 27th day of November, A. D. 1883, W. B. Henderson filed in said land office, for the purpose of locating the same on said lands, four certain blocks or pieces issued by the United States, to the heirs of Joseph Girard; that E. B. Chamberlain, Julius Cæsar, M. M. Nelson, and the widow of Edmond S. Carew, have been residing continuously on said lands since the filing of their said claims, and are still residing thereon; that Louis Bell, Sr., who is now dead, was many years ago in the service of the United States Army; that he had been living on the military reservation for many years by permission of the War Department on account of his former services; that his residence and occupation only embraced a small tract of land, not exceeding three acres in extent; and de-
227 ponents are informed and believe that he was not, during his lifetime, nor are his widow and family, since his death, the owners of the house and other improvements occupied by them on said reservation, but that the same are owned by another person.

Deponents further state that by order of the Commissioner of the General Land Office a hearing has been recently had, before the register and receiver, and testimony taken concerning the several claims above alluded to, but that no decision has yet been rendered thereon. Deponents further say and aver that they have been informed and state the same to be a fact on information and belief, that Senator Wilkinson Call, has recently introduced a bill into the Congress of the United States to grant the said lands to the city of Tampa.

JNO. T. LESLEY.
WM. B. HENDERSON.
WM. C. BROWN.
JOSIAH FERRIS.

Sworn to and subscribed before me this 9th day of December, A. D. 1889.

P. O. KNIGHT,
[SEAL.] *Notary Public for State at Large.*

Endorsements on the back thereof are as follows: In the circuit court for the United States for the northern district of Florida. Mr. Louis Bell's Widow and others *vs.* The Florida Central and Peninsular Railroad Company. Affidavit. Filed this 21st day of January, A. D. 1890. H. L. Crane, deputy clerk.

228 United States Circuit Court, Southern District of Florida.

MRS. LOUIS BELL ET AL.
vs.
THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY.

This cause coming on to be heard before the undersigned circuit judge, upon due notice to the defendant, upon the bill and affidavits presented by the respective parties, and was argued by Mr. H. Bisbee for the complainants, and Mr. John A. Henderson for the defendants.

Whereupon it is ordered and adjudged that upon the filing of the said bill and affidavits in the office of the clerk of the circuit court of the southern district of Florida, in addition to issuance of subpœna, an injunction *pendente lite* may issue, enjoining and restraining the defendant company, its officers and agents, from further trespassing upon the lands claimed by the complainants as described in the said bill; and from entering upon and constructing and operating a railroad through the said lands and premises.

Provided, however, and it is so ordered that the said injunction *pendente* when issued, may and at the same time shall be dissolved, upon the defendant company executing and filing in the said suit its bond in the sum of five thousand dollars ($5,000.00) with good and solvent security to be approved by one of the judges, or the clerk, of said court in favor of the complainants, conditioned to pay all damages that may result to the said complainants from the construction, building or operating of said road, whenever the
229 said complainants shall obtain title thereto from the United States.

Said injunction may also be dissolved at any time that said defendant may obtain judgment of expropriation of the said lands for railroad purposes in any court of competent jurisdiction, and shall satisfy the same.

DON A. PARDEE,
Circuit Judge.

January 2nd, 1890.

Endorsements thereon are as follows: In circuit court, southern district of Florida. Mrs. Louis Bell *et al. vs.* The Florida Central and Peninsular R. R. Co. Order of court for injunction. Filed this 21st day of January, A. D. 1890. H. L. Crane, deputy clerk.

Circuit Court of the United States, Southern District of Florida.

The President of the United States to the president and officers of the Florida Central and Peninsular Railroad Company and their counsellors, attorneys, contractors, and agents and each and every one of them:

Whereas, it has been represented to us in our circuit court in equity for the southern district of Florida, on the part of Mrs. Louis Bell *et al.*, plaintiffs, and they have by bill of complaint so represented against you that it has after full hearing and due consideration, and upon the filing of the said bill and affidavits in the office of the clerk of the circuit court for the southern district of Florida.

Whereupon it is adjudged in addition to issuance of sub-
230 pœna an injunction *pendente lite* issue enjoining and restraining the defendant, the said Florida Central and Peninsular Railroad Company, its officers and agents from further trespassing upon the lands claimed by the complainants, as described in the said bill; and from entering upon and constructing and operating a railroad through the said lands and premises.

Provided, however, and it is so ordered that the said injunction *pendente* may and the same shall be dissolved upon the defendant company executing and filing in the said suit its bond in the sum of five thousand dollars ($5,000.00), with good and solvent security, to be approved by one of the judges or the clerk of said court in favor of the complainants, conditioned to pay all damages that may result to the complainants from the construction, building or operating of road, whenever the said complainants shall obtain title thereto from the United States.

Said injunction may also be dissolved at any time that said defendant may obtain judgment of expropriation of the said lands for railroad purposes in any court of competent jurisdiction, and shall satisfy the same.

We do therefore in consideration thereof strictly command and enjoin you and each of you from continuing in possession or entering upon, taking or using, the said land or any part thereof, until you may have fully complied with said order, under the penalty of being liable for contempt of court.

Witness Hon. M. W. Fuller, Chief Justice of the United States at Tampa, the twenty-first day of January, A. D. 1890.

E. O. LOCKE, *Clerk*,
By H. L. CRANE,
Deputy Clerk.

We hereby accept service of the above this 22d day of January, 1890.

WALL AND KNIGHT,
Attorneys for F. C. & P. R'y Co.

231 (The endorsements on the back thereof are as follows:)
United States circuit court, southern district of Florida. Mrs. Louis Bell *et al. vs.* The Florida Central and Peninsular Rail-

road Co. Writ of injunction. Filed this 22d day of January, A. D. 1890. H. L. Crane, deputy clerk.

Further endorsements: Came to hand January 29th, 1890, and executed on the same day, by serving a copy on Wall & Knight, attorneys for the said R. R. Co. W. G. Bartholomew, deputy U. S. marshal.

By Mr. KNIGHT: I desire to file in evidence all the condemnation proceeding of the defendant against the Bell heirs, now pending in the State court, the said suit being one to condemn the property in controversy, and to pay full compensation therefor.

There is no objection to the introduction of the files in the condemnation proceeding.

The files in the condemnation proceeding are as follows:

232 In the Circuit Court, Sixth Judicial Circuit, Hillsborough County, Florida.

THE FLORIDA CENTRAL AND PENINSULAR RAILroad Company, a Corporation,
vs.
FRANK A. BELL ET AL. } Condemnation.

The State of Florida to Thomas K. Spencer, sheriff of the county of Hillsborough, State of Florida, and to all and singular the sheriffs of the State of Florida:

This is to command you that you make known to William J. Bell, Eliza Ann Bell, Frank A. Bell, Matilda P. Feihe (*née* Bell), Anton Fiehe, Simon L. Bell, John Walter Bell, George A. Bell, and Florencia Bell, that they be and appear before the clerk of the circuit court for Hillsborough county, Florida, on the 1st day of February, A. D. 1897, to show what interests they have, if any, in the following-described property, to wit: Situate, lying and being in Hillsborough county, State of Florida, and described as follows, to wit: The right of way through lot eight, section twenty-four, township twenty-nine, south of range eighteen east, Fort Brooke reservation, known as the Bell property, and commencing at a point, which point is the intersection of center line of Florida Central and Peninsular railroad and range line, between ranges eighteen and nineteen; thence south 108 feet, more or less, to a point on said range line; thence south sixty-six degrees ten minutes west, fourteen hundred and twenty-four feet, more or less, to line dividing lots eight and nine, this said last line being
233 one hundred feet from and parallel to center line of said railroad; thence north along said dividing line between lots eight and nine, one hundred and sixteen feet, more or less, to south line of Whiting street, more particularly described as north line of Fort Brooke reservation; thence north sixty-six degrees ten minutes east along said north line of Fort Brooke reservation one hundred feet; thence at right angles to said north line, south twenty-three degrees fifty minutes east, seventy-five feet to a point, which point

is twenty-five feet from center line of said Florida Central and Peninsular railroad; thence north sixty-six degrees ten minutes east thirteen hundred feet more or less, to said range line, this last line being twenty-five feet distant from and parallel to center line of Florida Central and Peninsular railroad; thence south along said range line twenty-six feet more or less, to point of beginning, containing 4.29 acres more or less, and that they show cause, if any they can, why said property should not be taken for the uses and purposes set forth in the petition filed in the office of the clerk of the circuit court, for Hillsborough county, Florida, by the Florida Central and Peninsular Railroad Company, a corporation, against said above-named parties and have you then and there this writ.

Witness the Honorable Barron Phillips, judge of said court, as well as Charles Wright, clerk of said court, on this 21st day of December, A. D. 1896.

[SEAL.] CHAS. WRIGHT, *Clerk.*

The endorsements on the back thereof are as follows: In the circuit court, Hillsborough county, Florida. The Florida Central and Peninsular Railroad Company *vs.* Frank A. Bell *et al.* *Scire facias.* Filed December 21st, 1896. Chas. Wright, clerk. P. O. Knight, solicitor for complainant.

234 The return on the back thereof is as follows: Received the within *scire facias* on this 21st day of December, A. D. 1896, and served the same on this the 26th day of December, 1896, by reading this original *scire facias* to the within-named Eliza Ann Bell, Frank A. Bell, Anton Fiehe, Simon L. Bell, John Walter Bell and George A. Bell at the same time delivering to each and every one of the above-named parties a true and correct copy of this original *scire facias.* I further return that William J. Bell, Matilda P. Fiehe and Florencia Bell could not be found. Done on this 24th day of December, A. D. 1896. T. K. Spencer, sheriff, by John Mooney, D. S.

Citation.

In the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for the County of Hillsborough.

THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY, a Corporation,
vs.
WILLIAM J. BELL, ELIZA ANN BELL, FRANK A. BELL, MATILDA P. FIEHE (*née* Bell), Anton Fiehe, Simon L. Bell, John Walter Bell, George A. Bell, and Florencia Bell.

To all whom this may concern:

235 Notice is hereby given to all parties interested in or having liens upon the following-described property, situate, lying and being in Hillsborough county, State of Florida, and described as follows: The right of way through lot 8, section twenty-four, township twenty-nine south of range eighteen east, Fort

Brooke reservation, known as the Bell property, and commencing at a point, which point is intersection of center line of Florida Central and Peninsular railroad and range line between ranges eighteen and nineteen; thence south 108 feet, more or less, to a point on said range line; thence south sixty-six degrees, ten minutes; west 1,424 feet, more or less, to line dividing lots eight and nine. This said last line being one hundred feet distant from and parallel to center line of said railroad; thence north; thence north along said dividing line between lots eight and nine, 116 feet, more or less, to south line of Whiting street, more particularly described as north line of Fort Brooke reservation; thence north 66 degrees 10 minutes east along said north line of Fort Brooke reservation 100 feet; thence at right angles to said north line south twenty-three degrees 50 minutes east, 75 feet, to a point, which point is 25 feet from the center line of said Florida Central and Peninsular railroad; thence north 66 degrees 10 minutes east, 1,300 feet, more or less, to said range line, this last line being twenty-five feet distant from and parallel to center line of Florida Central and Peninsular railroad; thence south along said range line 26 feet, more or less, to point of beginning, containing 4.29 acres, more or less; that the Florida Central and Peninsular Railroad Company, by its attorney, Peter O. Knight, did file in the office of the clerk of the circuit court for Hillsborough county, Florida, on the 21st day of December, 1896, a petition directed against all of the above-named parties, for the purpose of condemning the above-described property, and this is to give notice that you will appear on the first day of February, A. D. 1897,
236 before the clerk of the circuit court for Hillsborough county, Florida, to show cause, if any you can, why said property should not be condemned for the uses and purposes set forth in the petition filed by the Florida Central and Peninsular Railroad Company, or else that your interest in said property be barred.

In witness whereof I have hereunto set my hand and affixed the seal of said court, on the 21st day of December, A. D. 1896.

[SEAL.] CHAS. WRIGHT, *Clerk.*

PETER O. KNIGHT,
Attorney for Petitioner.

Publisher's Affidavit.

STATE OF FLORIDA, } ss:
County of Hillsborough, }

I, W. F. Stovall, do hereby certify that I am publisher of the weekly edition of the Morning Tribune, a newspaper published weekly in the aforesaid county, and that the notice of citation, a copy of which is hereto attached, was published in said paper in its issues of Dec. 21, 24, 31, Jan. 7, 14, 21, 28.

W. F. STOVALL.

Subscribed and sworn to before me this 3rd day of Feb'y, 1897.

P. O. KNIGHT,
Notary Public, State at Large.

237 In the Circuit Court for the 6th Judicial Circuit, Hillsborough County, State of Florida.

THE FLORIDA CENTRAL AND PENINSULAR RAILroad Company, a Corporation,
vs.
FRANK A. BELL ET AL. } Condemnation.

To the Honorable Barron Phillips, judge of the 6th judicial circuit of the State of Florida, sitting in and for Hillsborough county:

Your petitioner, The Florida Central and Peninsular Railroad Company, begs leave to show unto your honor—

First. That it is a corporation organized and existing under the laws of the State of Florida, and as such corporation has the right to condemn for its purposes, for the reasons hereinafter set forth, the property hereinafter described.

Second. That it had constructed its track on the following-described property, to wit, lying and being in Hillsborough county, State of Florida, and described as follows: The right of way through lot eight, section twenty four, township twenty-nine south, of range eighteen east, Fort Brooke reservation, known as the Bell property, and commencing at a point, which point is the intersection of center line of Florida Central and Peninsular railroad and range line between ranges eighteen and nineteen; thence south one hundred feet more or less, to a point on said range line;
238 thence south sixty-six degrees and ten minutes west fourteen hundred and twenty-four feet more or less, to line dividing lots eight and nine; this said last line being one hundred feet distant from and parallel to the center line of said railroad; thence north along said dividing line, between lots eight and nine, two hundred and sixteen feet, more or less, to south line of Whiting street, more particularly described as the north line of Fort Brooke reservation; thence north sixty-six degrees ten minutes east along said north line of Fort Brooke reservation one hundred feet; thence at right angles to said north line, south twenty-three degrees fifty minutes, east seventy-five feet to a point, which point is twenty-five feet from center line of said F. C. & P. R. R.; thence north sixty-six degrees ten minutes, east thirteen hundred feet, more or less, to said range line, this last line being twenty-five feet distant from and parallel to center line of Florida Central and Peninsular railroad, thence south along said range line twenty-six feet, more or less, to point of beginning, containing 4.29 acres, more or less; that its said track occupies said land and is being used by it for the purposes of transportation of its cars for ordinary railway purposes, and that it desires to condemn said described property for the purposes aforesaid.

Third. The names of the occupants of the property, and the names of the places of residence, legal disabilities, if any, and the interests of all the owners and mortgagees, which by diligent search and inquiry, your petitioner has been able to ascertain, are as follows: William J. Bell, Eliza Ann Bell, Frank A. Bell, Matilda P.

Feihe (*née* Bell), Anton Feihe, Simon L. Bell, John Walter Bell, George A. Bell, Florencia Bell, all of the county of Hillsborough and State of Florida, and all over the age of twenty-one years.

Fourth. The purpose of taking said property is that the
239 title to the said described property, which is now the right of way of the Florida Central and Peninsular Railroad Company, may be vested in said company for its ordinary railway purposes, it being now a corporation actually in existence and having a line of railway in operation from the city of Tampa to the city of Jacksonville in the State of Florida, and other points in said State and other States.

Fifth. Your petitioner further show- unto your honor as aforesaid, that it is seeking to obtain said right of way in good faith; that it has not only located its line over said right of way above described, but that it has actually constructed the same, and is now in possession of said above-described property, for the purposes set forth aforesaid.

Your petitioner therefore prays that said above-described property be condemned for uses and purposes therein, and that the ordinary process of this court may be issued, directed to the parties interested, to show cause, if any they can, why said property should not be condemned, for the uses and purposes aforesaid, and your petitioner will ever pray.

PETER O. KNIGHT,
Attorney for Plaintiff.

STATE OF FLORIDA, }
County of Hillsborough, } *ss:*

Personally appeared before me Peter O. Knight, who being duly sworn, says: That he is the attorney for the petitioner aforesaid; that he has read over the foregoing petition and he knows of his own knowledge that the facts set forth in said petition are true.

Deponent further says that diligent search and inquiry has been made, by the petitioner, to ascertain the names, places of resi-
240 dence and legal disabilities, and the interests of all the owners and mortgagees of the property described in the aforesaid petition, and these as ascertained, are set forth in the petition.

PETER O. KNIGHT.

Sworn and subscribed to before me on this 21st day of December, A. D. 1896.

[SEAL.] PAUL WORTH SMITH.

The endorsements on the back thereof are as follows: In the circuit court, Hillsborough county, Florida. The Florida Central and Peninsular Railroad Company *vs.* Frank A. Bell *et al.* Condemnation. Petition. Filed December 21st, 1896. Chas. Wright, clerk. P. O. Knight, solicitor for complainant.

In the Circuit Court, Sixth Judicial Circuit, in and for Hillsborough County, Florida.

THE FLORIDA CENTRAL AND PENINSULAR RAILroad Company, a Corporation,
vs.
FRANK A. BELL ET AL. } Condemnation.

The Answer of Respondents to the Petition and Rule to Show Cause in the Above-entitled Proceeding.

Come now all the parties respondent mentioned and de-
241 scribed in the said petition and rule to show cause, by the said petitioner against Frank A. Bell, *et al.*, by H. Bisbee, their attorney, and responding to the said petit-on and rule to show cause, respectfully allege, that William J. Bell, Eliza Ann Bell, Frank A. Bell, Matilda P. Feihe (*née* Bell), John Walter Bell, are the children and heirs of Louis Bell, Sr., late of Hillsborough, county, State of Florida, and George A. Bell, are the children of Louis Bell, Junior, late of said county, who died before the death of his father Louis Bell, Sr., and that the said Simon and George are the grandchildren and heirs of the said Louis Bell, Sr., and that Florence Bell is the wife of the said Louis Bell, Junior, and that Anton Feihe is the husband of the said Matilda.

2. That on the 29th day of July, A. D. 1896, the Government of the United States of America granted, issued and delivered a patent for all of lot eight, section twenty-four, township twenty-nine south, range eighteen east, described in said petition to the said Louis Bell, Sr., and his heirs, which patent has been recorded in said county, and that by the force and effect of the said patent, the legal title to and beneficial ownership of all of said lot became vested in fee-simple in these respondents who are the heirs of Louis Bell, Sr., as hereinbefore alleged. A true copy of which patent is hereto attached, marked Exhibit "A."

Third. Those respondents further aver that the said petitioner The Florida Central & Peninsular Railroad Company, has not, in and by the said petition and rule to show cause, stated any facts sufficient to entitle it to a judgment of this court, condemning any part of said lot eight under the laws of eminent domain of this State, and respondents claim the same benefit and advantage of this objection and to the jurisdiction of this court as if they had demurrer to said petition and rule upon the grounds hereinafter stated.

242 A. The said petition does not contain any facts sufficient to give this court jurisdiction to render the judgment prayed for.

B. The said petition and rule do not state any facts or averments establishing its legal right under the laws of eminent domain to have any of said lot condemned for its uses and purposes of a right of way for its railroad track. Said petition and rule do not show that any part of said lot eight is located within the chartered route

of the line of railroad which said petitioner was, or is authorized to construct by the laws of Florida.

C. The said petition and rule do not state any facts establishing the necessity of condemning any part of the said lot, for the public uses for petitioner as a railroad company under the law of Florida.

D. The said petition and rule do not state and allege any facts showing the uses and purposes for which petitioner prays to have a part of the said lot conveyed.

These respondents aver that long prior to the filing of the said petition in this court, the said heirs of Louis Bell, respondents herein, brought their suit by bill in equity in the circuit court of the United States for the southern district of Florida against the said petitioner, for the purpose of enjoining and praying that it be temporarily and permanently enjoined from running its trains upon any part of said lot, and from occupying any part thereof, on the ground, among others that, under the laws of the State of Florida, the said petitioner has not a legal right to condemn any part of the said lot to its uses, and on the ground that the said petitioner is and has been for some time a trespasser on said lot. That in the said bill it is alleged and facts duly set forth showing that complainants in said bill claim rights and title to said land under the laws of the United States, and that said petitioner denies such titles and rights,
243 and asserts the right to occupy the said lot with its railroad track under the laws of the United States. And the said bill in equity also alleges that William J. Bell and John Walter Bell, are citizens of the State of Texas, and were citizens of said State at and before the said bill was filed. These respondents aver that the said petitioner appeared in the said suit in the said Federal court long before the said petition was filed in this court; that the said Federal court has taken jurisdiction of the said suit and granted orders therein, before the said petition was filed in this court, and has acquired in said suit jurisdiction of the question whether or not the said petitioner has the legal right under its charter and the laws of Florida to have any part of the said lot condemned for its uses and purposes, under the laws of eminent domain which will more fully and at large appear from the record of the said suit in said court, and these respondents hereby plead the pendency of the said suit in the said Federal court, and the said proceedings had therein, in bar of this said petition and rule to show cause.

Fifth. If the foregoing objections are all overruled, by the court, these respondents further aver that the description of the land sought to be condemned in said petition is too uncertain and indefinite to entitle the petitioner to the judgment it prays for, or to enable a jury to assess and award damages to respondents.

Sixth. These respondents further aver that no part of the said lot eight is between the termini and within the chartered route of the line of railroad of the said petitioner, specified and mentioned in its articles of association, nor within such termini and chartered route as specified in the letters patent issued by the State of Florida to said petitioner, and that said petitioner was first organized in

July, 1888, and was organized under the general incorpora-
244 tion acts of the legislature of Florida in respect to railroads and canals and not otherwise.

Seventh. These respondents aver that the said petitioner before it trespassed upon the said lot and constructed its road across the same, which was in the latter part of 1889 and the early part of 1890, had obtained from the city of Tampa, within the limits of which the said lot was and is located, a license and authority by an ordinance of the council of said city to locate and construct its road on Whiting street of said city, which said street is north of said lot eight, and that said ordinance and subsequent ordinances of said council, granting such license and authority, have remained and still remain in full force and effect. And these respondents aver that they were in possession of the said lot eight, and occupied the same under and by virtue of a compliance with the laws of the United States in respect to pre-emption claims, and other laws of the United States, long before and at the time said petitioner trespassed upon and constructed its railroad across the said lot, and that petitioner constructed its said road across the said lot, against the protests, remonstrances and consent of these respondents; and respondents have brought a suit of ejectment in the said Federal court against the said petitioner to eject it from the said lot, which suit was brought before the said petition was filed in this court, and is still pending and undetermined.

Wherefore these respondents pray that the said petition and rule to show cause be dismissed and quashed at petitioner's cost, and these respondents will ever pray, etc.

FRANK A. BELL ET AL.,
By H. BISBEE, *Their Attorney.*

STATE OF FLORIDA, }
Hillsborough County. }

Personally appeared before me, Chas. E. Johnson, a
245 notary public, Frank A. Bell, who, being duly sworn, deposes and says that the facts set forth in the foregoing answer are true to the best of his knowledge, information and belief.

FRANK A. BELL.

Sworn and subscribed before me this 30th day of January, 1897.

[SEAL.] CHAS. E. JOHNSON,
Notary Public.

EXHIBIT "A."

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, Greeting:

Certificate No. 16065.

Whereas Louis Bell, of Hillsborough county, Florida, has deposited in the General Land Office of the United States, a certificate of

the register of the land office at Gainesville, Florida, where it appears that full payment has been made by the said Louis Bell according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," and the acts supplemental thereto, for the lot numbered eight of section twenty-four in township twenty-nine south of range eighteen east of Tallahassee meridian in Florida, containing sixteen acres and seventy-three-hundredths of an acre according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Louis Bell.

246 Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted and by these presents do give and grant, unto the said Louis Bell and to his heirs, the said tract above described; to have and to hold the same together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said Louis Bell and unto his heirs and assigns forever.

In testimony whereof I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand and at the city of Washington, the twenty-ninth day of July, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twenty-first.

By the President:

GROVER CLEVELAND,

[SEAL.] By H. McKEAN, *Secretary.*

Recorded, vol. 23, page 133.

L. Q. C. LAMAR,
Recorder General Land Office.

The endorsements of the back of this answer of respondents are as follows: In the circuit court, sixth judicial circuit, in and for Hillsborough county, Florida. The Florida Central and Peninsular Railroad Company *vs.* Frank A. Bell *et al.* Condemnation. Answer of respondents to rule to show cause. Filed January 30th, 1897. H. L. Mitchell, clerk. *A.* Bisbee, attorney for respondents.

247 *Amended Petition of Petitioner.*

In the Circuit Court for the 6th Judicial Circuit, Hillsborough County, State of Florida.

THE FLORIDA CENTRAL AND PENINSULAR RAILroad Company, a Corporation,
vs.
FRANK A. BELL ET AL. } Condemnation.

To the Honorable Barron Phillips, judge of the circuit court of the sixth judicial circuit of the State of Florida, sitting in and for Hillsborough county:

Your petitioner, The Florida Central and Peninsular Railroad Company, by leave of the court first had and obtained, begs leave to show unto your honor:

First. That it is a corporation, organized and existing under and by virtue of the laws of the State of Florida; that it is organized for the purpose of constructing, maintaining and operating a railroad, for public use, and conveyance of persons and property, and for maintaining and operating certain railroads, already constructed for like public uses, and such corporation has the right to condemn for its purposes, for reasons hereinafter set forth, the property hereafter described; that the railroad of said company is now
248 actually constructed on, and across the lands sought to be condemned and hereafter particularly described, and that said lands are essential for the use of the corporation; that the said corporation has made its survey and maps thereof, by which its road or line is designated; that it has located its road and track, according to such survey, and has filed its certificate of such location, signed by the chief engineer of said company, in office of the clerk of the circuit court for Hillsborough county, Florida; that the use of said lands is necessary for the purpose of operating its railroad; that your petitioner has not acquired the right to use the same, nor has it legal title to the same.

Second. That it has constructed its track on the following-described property, to wit: lying and being in Hillsborough county, State of Florida, and described as follows: The right of way through lot eight, section twenty-four, township twenty-nine south of range eighteen, east, Fort Brooke reservation, known as the Bell property, and commencing at a point, which point is the intersection of center line of Florida Central and Peninsular railroad and range line, between ranges eighteen and nineteen; thence south one hundred and eight feet, more or less, to a point on said range line; thence south sixty-six degrees and ten minutes west fourteen hundred and twenty-four feet, more or less, to line dividing lots eight and nine. This said last line being one hundred feet distant from and parallel to centre line of said railroad; thence north along said dividing line between lots eight and nine two hundred and sixteen feet, more or less, to south line of Whiting street, more particularly described

as north line of Fort Brooke reservation; thence north sixty-six degrees ten minutes east, along said north line of Fort Brooke reservation one hundred feet; thence at right angles to said north line south twenty-three degrees fifty minutes east seventy-five feet to a point, which point is twenty-five feet from center line of said
249 F. C. & P. R. R.; thence north sixty-six degrees, ten minutes east, thirteen hundred feet, more or less, to said range line, this last line being twenty-five feet distant from and parallel to center line of Florida Central and Peninsular railroad; thence south along said range line twenty-six feet, more or less, to point of beginning, containing 4.29 —, more or less; that its said track occupies said land, and is being used by it for the purposes of transportation of its cars, for ordinary railway purposes and that it desires to condemn said described property for the purposes aforesaid. That said land is on its line, located as aforesaid.

Third. The names of the occupants of the property and the names of the places of residences, legal disabilities, if any, and the interests of all the owners and mortgagees, which by diligent search and inquiry your petitioner has been able to ascertain, are as follows: William J. Bell, Eliza N. Bell, Frank A. Bell, Matilda F. Fiehe, (*née* Bell,) Anton Fiehe, Simon L. Bell, John Walter Bell, George A. Bell, Florencia Bell, all of the county of Hillsborough, and State of Florida, and all over the age of twenty-one years.

Fourth. The purpose of taking said property, is that the title to the said described property, which is now the right of way of the Florida Central & Peninsular Railroad Company, and which is also its main line, the city of Tampa to the city of Jacksonville, and necessary for the operation of its cars, to and from said points, for the purposes of carrying passengers and freight, may be vested in said company for the purposes aforesaid; said line also extending to other points in the State of Florida and in other States; and, that said location and line was made under and by virtue of the rights, privileges and franchises, and authority heretofore conferred upon it by law.

Fifth. Your petitioner further shows unto your honor as
250 aforesaid, that it is seeking to obtain said right of way in good faith; that it has not only located its line over said right of way, above described, but it has actually constructed the same, and it is now in possession of said above-described property, for the purposes set forth aforesaid.

Your petitioner therefore prays that the said above-described property be condemned, for the uses and purposes therein, and that the ordinary process of this court may be issued, directed to the parties interested, to show cause, if any they can, why said property should not be condemned for the uses and purposes aforesaid, and your petitioner will ever pray.

PETER O. KNIGHT,
Attorney for the Florida Central and Peninsular Railroad Company.

STATE OF FLORIDA, }
County of Hillsborough. }

Personally appeared before me, Peter O. Knight, who being duly sworn, says that he is the attorney for the petitioner aforesaid, to ascertain the names, places of residence and legal disabilities, and the interests of all the owners and mortgagees, of the property described in the aforesaid amended petition, and these, as ascertained, are set forth in the petition.

PETER O. KNIGHT.

Sworn to and subscribed before me on this, the 11th day of February, A. D. 1897.

[SEAL.] CHAS. C. WHITAKER,
Notary Public, State of Florida at Large..

251 In the Circuit Court, Sixth Judicial Circuit, in and for Hillsborough County.

THE FLORIDA CENTRAL AND PENINSULAR RAILroad Company, a Corporation,
vs.
FRANK A. BELL ET AL. } Condemnation.

The Answer of Respondents to the Amended Petition and Rule to Show Cause in the Above-entitled Proceeding.

Come now all the parties respondent mentioned and described in the said petition and rule to show cause, by the said petitioner against Frank A. Bell *et al.* by H. Bisbee, their attorney, and responding to the said petition and rele to show cause, respectfully allege that William J. Bell, Eliza N. Bell, Frank A. Bell, Matilda P. Fiehe (*née* Bell,) John Walter Bell, are the children and heirs of Louis Bell, Sr., late of Hillsborough county, State of Florida, deceased, who died in the year 1885; that Simon Bell and George A. Bell are the children of Louis Bell, Jr., late of said county, deceased, who died before the death of his father, Louis Bell, Sr., and that the said Simon and George are the grandchildren and heirs of the said Louis Bell, Sr., and that Florence Bell is the wife of the said Louis Bell, Jr., and that Anton Fiehe is the husband of the said Matilda.

Second. That on the 29th day of July, A. D. 1896, the Government of the United States of America granted, issued and delivered a patent for all of lot eight, section twenty-four, township twenty-
nine, south, range eighteen east, described in said petition,
252 to the said Louis Bell, Sr., and his heirs, which patent has been recorded in said county, and that by the force and effect of the said patent the legal title to, and beneficial ownership of all of said lot became vested in fee-simple in these respondents who are the heirs of Louis Bell, Sr., as hereinbefore alleged. A true copy of which patent is hereto attached marked Exhibit A.

Third. These respondents further aver that the said petitioner, The Florida Central and Peninsular Railroad Company has not, in

and by the said petition and rule to show cause, stated any facts sufficient to entitle it to a judgment of this court, condemning any part of said lot eight, under the laws of eminent domain of this State, and respondents claim the same benefit and advantage of this objection and to the jurisdiction of this court as if they had demurred to the said petition and rule upon the grounds hereinafter stated.

A. The said petition does not contain any facts sufficient to give this court jurisdiction to render the judgment prayed for.

B. The said petition and rule do not state any facts or averments establishing its legal right under the laws of eminent domain to have any of said lot condemned for its uses and purposes of its right of way for a railroad track. Said petition and rule do not show that any part of said lot eight is located within the chartered route of the line of railroad, which said petitioner is or was authorized to construct by the laws of Florida.

C. The said petition and rule do not state any facts establishing the necessity for condemning any part of said lot for the public uses of petitioner as a railroad company under the laws of Florida.

253 D. The said petition and rule do not state and allege any facts showing the uses and purposes for which petitioner prays to have a part of the said lot conveyed.

Fourth. These respondents aver that long prior to the filing of the said petition in this court, the said heirs of Louis Bell, respondents here, brought their suit by bill in equity in the circuit court of the United States for the southern district of Florida, against the said petitioner, for the purpose of enjoining, and praying that it be temporarily and permanently enjoined from running its trains upon any part of the said lot, and from occupying any part thereof, on the ground, among others, that under the laws of the State of Florida, the said petitioner has not a legal right to condemn any part of the said lot to its uses, and on the ground that the said petitioner is and has been for some time, a trespasser on said lot. That in the said bill it is alleged and facts duly set forth showing that complainants in said bill claim rights and title to said lot under the laws of the United States, and that said petitioner denies such titles and rights, and asserts the right to occupy the said lot with its railroad track under the laws of the United States. And the said bill in equity also alleges that William J. Bell and John Walter Bell, are citizens of the State of Texas, and were citizens of said State at and before the said bill was filed. These respondents aver that the said petitioner appeared in said suit in the said Federal court long before the said petition was filed in this court; that the said Federal court has taken jurisdiction of the said suit and granted orders therein, before the said petition was filed in this court, and has acquired in said suit, jurisdiction of the question whether or not the said petitioner has the legal right under its charter and the laws of Florida to have any part of the said lot condemned for its uses and purposes under the laws of eminent domain, which will more fully and at large appear from the

254 record of the said suit in said court, and these respondents hereby plead the pendency of the said suit in the said Fed-

eral court, and the said proceedings had therein, in bar of this said petition and rule to show cause.

Fifth. If the foregoing objections are all overruled by the court, these respondents further aver that the description of the land sought to be condemned in said petition is too uncertain and indefinite to entitle the petitioner to the judgment it prays for, or to enable a jury to assess or award damages to respondents.

Sixth. These respondents further aver that no part of the said lot eight is between the termini and within the chartered route of the line of railroad of the said petitioner specified and mentioned in its articles of association, nor within such termini and chartered route as specified in the letters patent issued by the State of Florida to said petitioner, and that said petitioner was first organized in July, 1888, and was organized under the general incorporation acts of the legislature of the State of Florida, in respect to railroad- and canals and not otherwise.

Seventh. These respondents aver that the said petitioner before it trespassed upon the said lot and constructed its road across the same, which was in the latter part of 1889, and the early part of 1890, had obtained from the city of Tampa, within the limits of which the said lot was and is located, a license and authority by an ordinance of the council of said city to locate and construct its road on Whiting street of said city, which said street is north of said lot eight, and that said ordinance and subsequent ordinances of said council granting such license and authority have remained, and still remain in full force and effect. And these respondents aver that they were in possession of the said lot eight, and occu-
255 pied the same, under and by virtue of a compliance with the laws of the United States, in respect to pre-emption claims and other laws of the United States, long before and at the time said petitioner trespassed upon and constructed its railroad across the said lot, and that petitioner constructed its railroad across the said lot against the protests, remonstrances and consent of these respondents, and respondents have brought a suit of ejectment in said Federal court against the said petitioner to eject it from the said lot, which suit was brought before the said petition was filed in this court, and is still pending and undetermined.

Eight. That section seven, of article second, of the articles of association of the said company, expressly designates and makes "Plant City," in Hillsborough county, the southern terminus of the road of said company, and that said section is in the following words, to wit: "From Waldo, in the county of Alachua, through the counties of Alachua, Marion, Sumpter, Hernando and Hillsborough, to Plant City, in said county of Hillsborough" which will fully appear from and be established by the said articles of association, a certified copy of which is now exhibited to this court.

Wherefore these respondents pray that the said petition and rule to show cause be dismissed and quashed at petitioner's cost, and these respondents will ever pray, etc.

H. BISBEE,
For Defendants.

STATE OF FLORIDA, }
Hillsborough County. }

Personally appeared before me, C. E. Harrison, county judge in and for said county, Frank A. Bell, who being duly sworn,
256 deposes and says, that the facts set forth in the foregoing answer are true to the best of his knowledge, information and belief.

FRANK A. BELL.

Sworn to and subscribed before me this 20th day of February, 1897.

[SEAL.] C. E. HARRISON,
County Judge.

EXHIBIT "A."

The United States of America to all to whom these presents shall come, Greeting:

(*Certificate No.* 16065.)

Whereas, Louis Bell, of Hillsborough county, Florida, has deposited in the General Land Office of the United States a certificate of the register of the land office at Gainesville, Florida, whereby it appears that full payment has been made by the said Louis Bell according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," and the acts supplemental thereto, for the lot numbered eight, of section twenty-four, in township twenty-nine south, range eighteen east of Tallahassee, meridian, in Florida, containing sixteen acres and seventy-three-hundredths of an acre, according to the official plat 66, the survey of the said lands, returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Louis Bell.

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of
257 Congress in such case made and provided, have given and granted and by these presents do give and grant, unto the said Louis Bell and to his heirs, the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said Louis Bell and to his heirs and assigns forever.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-ninth day of July, in the year of our Lord, one thousand eight

hundred and ninety-six, and of the Independence of the United States the one hundred and twenty-first.

By the President:

GROVER CLEVELAND,

[SEAL.] By M. McKEAN, *Secretary.*

Recorded, vol. 23, page 138.

L. Q. C. LAMAR,
Recorder of the General Land Office.

The endorsements on the back of said exhibit are as follows: In the circuit court, Hillsborough county. Condemnation proceeding. The Florida Central & Peninsular Railroad Company *vs.* Frank A. Bell *et al.*

The endorsements on the back of the answer of respondents, etc., with Exhibit "A" (above) attached, is as follows: In the circuit court, sixth judicial circuit, Hillsborough county, Florida.
258 The Florida Central & Peninsular Railroad Company *vs.* Frank A. Bell *et al.* Answer to amended petition and rule to show cause. Filed February 20th, 1897. H. L. Mitchell, clerk.

This cause came on to be heard upon the amended petition for condemnation of the lands described therein and answer thereto, and documentary evidence submitted, and was argued by counsel. On consideration thereof, it is ordered that the said amended petition be and the same is hereby dismissed in accordance with the prayer of the answer, but without prejudice to the filing of a new petition by the petitioner.

Done this the 5th day of March, 1897.

BARRON PHILLIPS, *Judge.*

The endorsements on the back thereof are as follows: The Florida Central and Peninsular Railroad Company, a corporation, *vs.* Frank A. Bell. In the circuit court, Hillsborough county, State of Florida. Amended petition of petitioner. Filed Feb'y 11, 1897. H. L. Mitchell, clerk. P. O. Knight, attorney for petitioner.

Articles of Association of a Railroad Company to be Known as the Florida Central and Peninsular Railroad Company.

We, whose names are hereunto subscribed, do hereby cer-
259 tify and declare that under and in pursuance of the laws of the State of Florida, we have purchased at foreclosure sales certain railroad properties and have associated and do hereby associate ourselves for the purpose of becoming incorporated as hereinafter mentioned, and of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, and of maintaining and operating certain railroads already constructed for the like public use.

Article first.

The name of said company is to be the Florida Central and Peninsular Railroad Company.

Article second.

The road shall be located as follows:

1. From a point in the city of Fernandina, in the county of Nassau, through the counties of Nassau, Duval, Clay, Bradford, Alachua, and Levy, to Cedar Keys in said county of Levy.

2. From a point in the city of Jacksonville, in the county of Duval, through the counties of Duval, Baker, Columbia, Suwanee, Madison, Jefferson, Leon and Gadsden to Chattahoochee in the county of Gadsden.

3. From Tallahassee, in the county of Leon, through the counties of Leon and Wakulla, to St. Marks, in said county of Wakulla.

4. From Drifton, in the county of Jefferson, through said county to Monticello in said county.

260 5. From Harts Roads, in the county of Nassau, through the counties of Nassau and Duval, to the city of Jacksonville in said county of Duval.

6. From a point on said last-mentioned railroad, near the city of Jacksonville, through the county of Duval to a point also near said city of Jacksonville on the said railroad from Jacksonville to Chattahoochee.

7. From Waldo, in the county of Alachua, through the counties of Alachua, Marion, Sumter, Hernando and Hillsborough to Plant City, in said county of Hillsboro.

8. From Panasoffkee, in the county of Sumter, through said county to Sumterville, in said county.

9. From a point on the said railroad from Waldo to Plant City, near Ocala, in the county of Marion, through said county to Silver Springs, in said county.

10. From Wildwood, in the county of Sumter, through the counties of Sumter and Orange to Tavares, in said county of Orange; with such spurs, branches and extensions as may be found necessary or expedient in the counties of Polk, Manatee, De Soto and Lee.

Article third.

The length of said railroad shall be about six hundred miles.

Article fourth.

The authorized amount of the capital stock of said corporation is twenty-six million and eighty-two thousand dollars ($26,082,000), divided into two hundred and sixty thousand and eight hun-

261 dred and twenty (260,820) shares of one hundred dollars each, whereof one million five hundred and eighty-two thousand dollars ($1,582,000) in amount is to be first preferred stock, entitled in preference to and priority over all other stock to dividends thereon at a rate of five per cent. per annum if the same is earned

in any one calendar year after payment of all interest due on an issue of $3,000,000 of first-mortgage bonds of the company, and all general and operating expenses and all expenses for repairs, renewals and replacements, taxes, insurance and the cost of necessary additions to rolling stock during same period, and if not earned such five per cent. dividend shall be cumulative, and shall be paid out of such subsequent net incomes before any dividend is paid on the second preferred or on the common stock.

And in case of sale, by reason of default, on any prior mortgage or lien; any surplus remaining, after paying principal and interest on said bonds, shall be paid *pro rata* to holders of the first preferred stock to cover the face value of the principal and of the arrears of dividends then accumulated thereon.

And $4,500,000 in amount is to be second preferred stock entitled to a non-cumulative dividend of five per cent. when earned in any one calendar year as above defined, and after the payment in full of all dividends due on the first preferred stock.

And in case of sale because of default as aforesaid, the surplus remaining from the proceeds of sale after providing as aforesaid for the said mortgage bonds and first preferred stock shall be paid *pro rata* to holders of the principal of the second preferred stock to cover the face value thereof.

The remaining twenty million dollars in amount of such capital is to be common stock, which shall be entitled to all dividends
262 which may be earned in each calendar year as above decided, after providing for the expenses, liens and charges on the bonds and preferred stocks, as above enumerated. No second mortgage shall be placed on the property of this company, no lease of, or contract for surrendering the operation of the same shall be executed by it, no sale of any material portion of the same shall be made, no guarantee shall be given or assumed on the securities of any other company, no increase shall be made in the aggregate amount of first preferred stock, and no lien superior to the lien of the first and second preferred stock, other than the said mortgage to secure three million dollars of bonds, shall be put upon said railroad and other property except by and with the consent of a majority of the holders of the second preferred stock and of a majority of the common stock, and of seventy per cent. of the first preferred stock given in writing or at a meeting of such stockholders duly called for that purpose. Forms of the certificate of the first and second preferred and common stock are hereto attached and made a part hereof.

The names and places of residence of the directors of the company who shall manage its affairs for the first year and until others are chosen in their places are W. Bayard Cutting, R. Fulton Cutting, H. R. Duval, Edward N. Dickerson, Adolph Engler, William L. Breese, Frederick W. Foote, all of the city of New York, State of New York; Wayne McVeagh, city of Philadelphia, State of Pennsylvania; F. W. Peck, of the city of Chicago, State of Illinois; and J. H. Thomas, D. E. Maxwell, of the city of Jacksonville and John A. Henderson, of the city of Tallahassee, State of Florida.

W. Bayard Cutting, New York city..... 1,000 shares
Frederick W. Foote, New York city..... 1,000 shares
H. Rieman Duval, New York city..... 1,000 shares
263 Edward N. Dickerson, New York..... 1,000 shares
Adolph Engler, New York..... 1,000 shares
John A. Henderson, Tallahassee..... 500 shares

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Before me, the subscriber, a notary public in and for said county, severally personally appeared W. Bayard Cutting, H. Rieman Duval, and E. M. Dickerson, directors named in the foregoing articles, who, being duly sworn, each for himself, says that the names subscribed to the said articles are the genuine signatures of the persons named therein, and that it is intended in good faith to construct, maintain, and operate the road mentioned in said articles of association.

New York, June 30, 1888.

[L. S.] DANIEL RUMBOLD,
Notary Public, N. Y. Co. (61).

(Filed in office secretary of state, July 6th, 1888.)

STATE OF FLORIDA, } ss:
Office Secretary of State, }

I, Jno. L. Crawford, secretary of state of Florida, do hereby certify that the foregoing is a correct copy of the original now on file in this office.

Given under my hand and the great seal of the State of Florida, at Tallahassee, the capital, this the 14th day of November, A. D. 1895.

JOHN L. CRAWFORD,
[SEAL.] *Secretary of State.*

264 The endorsements on the back thereof are as follows, to wit:
Filed in evidence by respondents before me, this March 5th, A. D. 1897. Barron Phillips, judge.

In the Matter of the Amendments to the Charter of the Florida Central and Peninsular Railroad Company.

Extract from the minutes of the annual meeting of the stockholders of the Florida Central and Peninsular Railroad Company, held at the office of the company in Jacksonville, Florida, at twelve o'clock noon, Thursday, March 6th, 1890.

Mr. Engler offered the following resolution, which was unanimously adopted:

Whereas, by resolution of the board of directors of this company, heretofore, to wit, on the 31st day of October, 1889, and the 3rd day of January, 1890, for the purpose of extending the railroad of this

company from and to the points therein named, designated a route from Plant City to the waters of Tampa bay near the city of Tampa, a distance of twenty-two and a half miles, wholly in the county of Hillsborough, and from Tavares, in the county of Lake, to Orlando, in the county of Orange, a distance of thirty-two miles, and running through the counties of Lake and Orange, as the proposed extensions of its said road, upon which routes it declared its intention of constructing or acquiring and maintaining and operating its lines of railroad: and

Whereas, the said directors filed certified copies of such resolutions in the office of the secretary of state and caused the same to be recorded, as provided by law:

265 Now, therefore, be it resolved, That the action of the board of directors of this company in amending its charter so as to give to it the right to make such extensions and to acquire such other railroad, be, and the same is hereby, in all respects confirmed, ratified, and approved; and further

Resolved, That the necessary authority is hereby given to the president of this company to construct branches or extensions from the line of its railroad through any of the counties of the State of Florida.

A true and correct copy of the original as it appears in the records of the company.

Attest:

[L. S.] E. R. HOADLEY, *Secretary.*

"Filed in the office secretary of state March 10th, 1890."

Extract from the minutes of an adjourned regular meeting of the board of directors of the Florida Central and Peninsular Railroad Company, held at the office of the company, No. 32 Nassau street, New York city, January 3rd, 1890.

The president called the attention of the board to the fact that the present charter of the company did not provide for the extension of its lines in the county of Hillsborough and hence to Tampa, nor in any of the counties adjacent to or through which the company's line runs, and requested the direction of the board.

Whereupon, upon motion of Mr. Henderson, seconded by Mr. W. S. Cutting, it was unanimously

Resolved, That the articles of association of the Florida Cen-

266 tral and Peninsular Railroad Company be amended by adding to section 10, article 2, the following words: "Hillsborough, Lake, and Orange, and all other counties through which and adjacent to which the road of the said company and its various branches are or may be constructed;" also

Resolved, That this amendment be submitted to the stockholders' meeting to be held on March 6th, 1890, and that the notice required by law be duly given with a view to secure the vote of the requisite stockholders thereon.

A true and correct copy.

[L. S.] E. R. HOADLEY, *Secretary.*

"Filed in office secretary of state January 30th, 1890."

Extract from the minutes of a regular monthly meeting of the board of directors of the Florida Central and Peninsular Railroad Company, held at the office of the company, No. 32 Nassau street, New York city, at eleven o'clock a. m., on Thursday, October 31st, 1889.

Resolved, That the president be, and he is hereby authorized to contract with responsible parties, for the construction of an extension from Plant City, the present terminus of the company's road in Hillsborough county, to Tampa in said county.

A true and correct copy.

[L. S.] E. R. HOADLEY, *Secretary.*

"Filed in the office secretary of state, January 30th, 1890."

STATE OF FLORIDA, *Office Secretary of State,* } ss:

I, Jno. L. Crawford, secretary of state of the State of Florida,
267 do hereby certify that the foregoing extract from the minutes of a regular monthly meeting of the board of directors of the F. C. & P. R. R. Co., held on October 31, 1889, and extracts from minutes of an adjourned regular meeting of the board of directors of said company, held on January 3rd, 1890, and extract from the minutes of the annual meeting of the stockholders of the said F. C. & P. R. R. Co., held on March 6th, 1890, are true and correct copies as filed and recorded in this office.

Given under my hand and the great seal of the State of Florida, at Tallahassee, the capitol, this the 23rd day of January, A. D. 1897.

[SEAL.] JNO. L. CRAWFORD,
Secretary of State.

The endorsements on the back thereof are as follows: Amended petition. Articles of association. Filed by respondents March 5th, 1897. Barron Phillips, judge.

In the Circuit Court for Hillsborough County, Florida.

FLORIDA CENTRAL AND PENINSULAR RAILROAD Company, a Corporation, *vs.* WILLIAM J. BELL ET AL. } Condemnation.

Personally appeared before me Peter O. Knight, who, being
268 duly sworn, deposes and says, that he is now, and has been, ever since the latter part of 1889, one of the attorneys of the petitioner; that the petitioner concluded, during the year 1889, to extend its railroad from Plant City to Tampa and the waters of Hillsborough and Tampa bays, and that before making the extension contemplated, two-thirds of the directors of the petitioner passed a resolution and entered the same in the records of its proceedings, designating the route of such proposed extension and did, in accordance with sections 2246 and 2247 of the Revised Statutes of Florida,

file a certificate thereof, as therein provided, a copy of which extract, marked Exhibit "A," from the minutes of the annual meeting of the stockholders, held on the 6th day of March, 1890, being hereto annexed and made a part thereof.

PETER O. KNIGHT.

Sworn to and subscribed before me on this 23rd day of February, A. D. 1897.

PAUL WORTH SMITH,
Notary Public.

EXHIBIT "A."

In the Matter of the Amendment to the Charter of the Florida Central and Peninsular Railroad Company.

Extract from the minutes of the annual meeting of the stockholders of the Florida Central and Peninsular Railroad Company, held at the office of the company in Jacksonville, Florida, at twelve o'clock, noon, Thursday, March 6th, 1890.

Mr. Engler offered the following resolution, which was unanimously adopted:

269 Whereas, by resolutions of the board of directors of this company, regularly adopted heretofore, to wit: on the 31st day of October, 1889, and the 3rd day of January, 1890, for the purpose of extending the railroad of this company from and to the points therein named, designated a route from Plant City to the waters of Tampa bay, near the city of Tampa, a distance of twenty-two and a half miles, wholly in the county of Hillsborough, and from Tavares, in the county of Lake, to Orlando, in the county of Orange, a distance of thirty-two miles, and running through the counties of Lake and Orange, as the proposed extension of its said railroad, upon which routes it declared its intention of constructing or acquiring and maintaining and operating its lines of railroad; and,

Whereas, the said directors filed certified copies of such resolutions in the office of the secretary of state, and caused the same to be recorded as provided by law:

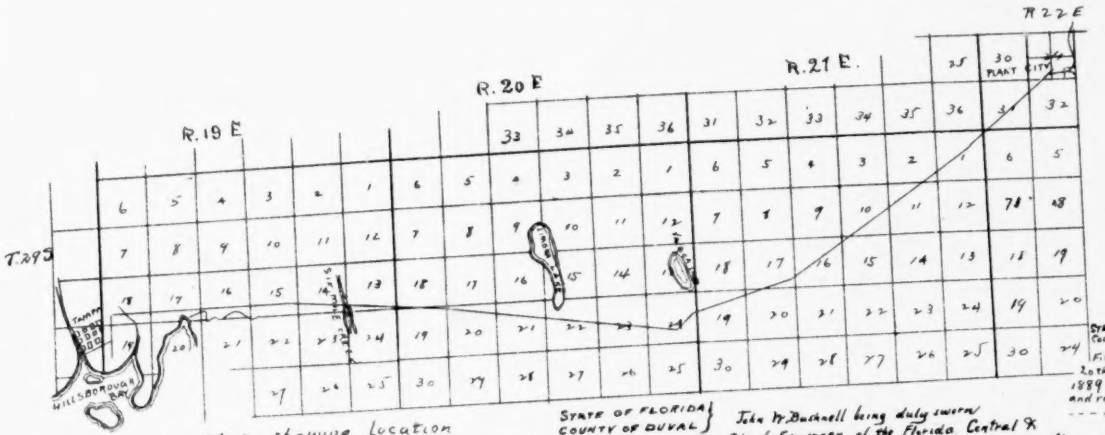
Now, therefore, be it resolved, That the action of the board of directors of this company in amending its charter so as to give to it the right to make such extensions and to acquire such other railroad, be, and the same is, hereby in all respects confirmed, ratified and approved; and further,

Resolved, That the necessary authority is hereby given to the president of this company to construct branches or extensions from the line of its railroad through any of the counties in the State of Florida.

A true and correct copy of the original as it appears in the records of the company.

[Company's Seal.]

Attest: E. R. HOADLEY, *Secretary.*



Map showing location of
FLORIDA CENTRAL & PENINSULAR Rail Road
From PLANT CITY to TAMPA

STATE OF FLORIDA
COUNTY OF DUVAL } John W. Bushnell being duly sworn says, that he is the Chief Engineer of the Florida Central & Peninsular railroad company, that the attached map is the route of its line of railroad from PLANT CITY to TAMPA that he has only surveyed & located the line of said railroad according to the line indicated thereon, that the work is and actively prosecuted on said line and that it is intended in good faith to construct said railroad, and that the route of the same is the most practical and available line for the construction of said road

J.W. Bushnell

Sworn to and subscribed before me this 17th day of December AD 1884

Rowena Donnell
Notary Public

NOTARY SEAL

STATE OF FLORIDA
County of Hillsborough } ss
Filed for record on the 20th day of December 9th 1884 at ... o'clock ... M and recorded in book ... of ... page ...
W.H. Greene
Clerk of Circuit Court
By W. Jolley
Deputy Clerk

" Copy

No. 332.
F.C. & P. R.R. Co. } p 270 1/2
v.
Bellestad

270 The endorsements on the back thereof are as follows: In circuit court, Hillsborough county, Florida. Florida Central and Peninsular Railroad Company *vs.* William J. Bell *et al.* Affidavit of Peter O. Knight, with exhibit attached. Filed March 5th, A. D. 1897. Barron Phillips, judge. Peter O. Knight.

Counsel agree that the condemnation and map of the city of Tampa can be introduced without objection on the part of counsel for defendant, and also that counsel for plaintiff can introduce, without objection, the map filed in the office of the clerk of the circuit court for Hillsborough county, Florida, by the chief engineer of said defendant, showing the line of definite location across the Fort Brooke reservation.

They are as follows:

(Here follows map marked p. 270½.)

By Mr. KNIGHT: I announced last evening, if the court please, that we had closed, but I find that I will have to introduce a little more testimony, and will submit it to the discretion of the court. I want to introduce a certified copy of an ordinance of the city of Tampa, passed in 1889, giving the defendant company the right to lay its track over Whiting street.

There is no objection, and the ordinance is as follows, to wit:

Ordinance No. 48.

271 An ordinance granting certain rights and privileges to the Florida Central and Peninsular Railroad Company.

Be it ordained by the city council of the city of Tampa, in council assembled:

SEC. 1. That the city of Tampa hereby grants unto the Florida Central and Peninsular Railroad Company the right to construct, lay and use one or more lines of track of its road over, through and upon Whiting street in said city, and to run engines and cars upon said railroad track or tracks, provided said railroad company shall commence building their road on said Whiting street within six months after the granting of these franchises.

SEC. 2. That the mayor of the city of Tampa, the president of the city council and the clerk of said city shall forthwith execute and deliver unto the said Florida Central and Peninsular Railroad Company a deed, or other written conveyance, under the seal of said city, giving, granting and conveying unto the said Florida Central and Peninsular Railroad Company the exclusive right to lay, maintain and use one or more tracks of railroad on, through and over said Whiting street; that said rails, equipments and franchises shall always be exempt from taxation by said city.

SEC. 3. That the consideration for which these franchises are granted shall be five dollars, the receipt whereof is hereby acknowledged.

SEC. 4. Be it further ordained, That the Florida Central and Peninsular Railroad Company must keep all street crossings of the streets occupied by said railroad company in good repair,
272 and shall construct said railroad on a line with the grade established for said street by the city engineer. The approaches and the space within the rails to be well planked at the crossing of streets, the spaces between the rails to conform to the established grade of said Whiting street, the full length of said street, and the material between the rails to be the same as that used on said street.

SEC. 5. All ordinances and parts of ordinances in conflict with this ordinance are hereby repealed.

FRED M. MYER,
President City Council.

Attest: LAMONT BAILEY, *City Clerk.*

Approved, November 5th, 1889.

THOS. E. JACKSON, *Mayor.*

STATE OF FLORIDA, }
County of Hillsborough. }

I, Warren Givens, clerk of the city of Tampa, county of Hillsborough, State of Florida, hereby certify that the foregoing ordinance, is a true and correct copy of said ordinance, as appears on the ordinance book of the city of Tampa, as No. 48, page 134.

Witness my hand and seal this 11th day of March, A. D., 1897.

W. A. GIVENS, *City Clerk,*
By JOHN M. HENDERSON,
Deputy Clerk.

273 The endor-ements on the back thereof are as follows: U. S. circuit court, southern district of Florida. Bell *et al. vs.* F. C. & P. R. R. Co. Copy of ordinance No. 48, with certificate of clerk. In evidence by defendant. Filed March 12, 1897. E. O. Locke, clerk, by H. L. Crane, deputy clerk.

By Mr. KNIGHT: Now, I would like to put Mr. Givens on the stand, and I will state the purpose of putting him there.

Mr. BISBEE: I would not like to assent to that. I don't know the purpose of that.

By Mr. KNIGHT: I will state frankly the purpose of putting Mr. Givens on the stand. I know that probably it has no weight with your honor, but at the same time, if the case should go to the appellate court, they know nothing of the case, except what appears on the record absolutely. I would desire to prove by Mr. Givens, the deputy clerk of this county, and who has been in this county for the past ten or twelve years, that he knows F. A. Salomonson, W. H. Beckwith and A. J. Knight, and the amount of interests that they represent in this city, for the purpose of setting forth just what that is and the amount that they own in this vicinity.

By the COURT: You want to prove the interests that they have in this city, and the respectability of your witnesses?

By Mr. KNIGHT: I simply make the announcement that I want to prove that and can prove that.

By Mr. *Knight:* Your point is that you want to show that they are large property-owners and land-owners in the city of Tampa.

274 By Mr. KNIGHT: I can show that these three people and the firms that they are interested in probably own and control more land in this city than all the balance of the population of this city.

Counsel for plaintiff object to the introduction of Mr. Givens as a witness for the purposes announced.

Objection is sustained by the court.

Counsel for defendant except to the ruling of the court.

Mr. KNIGHT: I want to introduce this map, which it was agreed yesterday that counsel for plaintiff should introduce.

By Mr. BISBEE: I will offer no objection, if you will make no objection to the introduction of a photographic copy of another map, which the clerk has.

Mr. KNIGHT: This is a map of the chief engineer of the railroad company showing the railroad line, on file in the records of Hillsborough county, Florida.

And the defendant thereupon further to maintain the issues on its part, introduced as a witness one D. B. GIVENS, who being duly sworn, testified as follows:

Q. Mr. Givens, you may state your name.

A. Darwin B. Given-.

Q. What official position, if any, do you hold in this county?

A. Deputy clerk of the circuit court.

Q. What position, if any, did you hold in this county, in December, 1889?

A. Deputy clerk.

Q. You may look at this map and state whether the same
275 was ever filed in the office of the clerk of the circuit court for Hillsborough county.

A. Filed on December 20th, 1889.

By Mr. KNIGHT: Now, if your honor please, we offer in evidence the map, showing the definite line of the location as filed in the office of the clerk of the circuit court, for Hillsborough county, Florida, in December, 1889, by the chief engineer of the defendant company.

By Mr. BISBEE: When was it filed?

By Mr. KNIGHT: In December, 1889.

By Mr. BISBEE: No objection on part of counsel for plaintiff. It shows nothing except a straight mark on a piece of paper.

Cross-examination:

Q. Mr. Givens, do you remember whether or not the railroad company filed any other map before or after this in your office?

A. Not to my knowledge.

Redirect examination:

Q. Mr. Givens, state what that is.

A. It purports to be a map of the city of Tampa made by T. W. Givens.

Q. You may state Mr. Givens, and show there the outline of the old map of Tampa.

A. It is circled by a blue-pencil mark on north, east, southeast and south, and on the west by the Hillsborough river.

276 Q. You have no objection to my introducing this map?

By Mr. BISBEE:

A. No. That is the map of Tampa?

A. Yes, sir.

By Mr. BISBEE: This map has never been filed?

—. No. Never been filed.

By Mr. BISBEE: When was the date of it?

A. In December, 1889.

By Mr. BISBEE: This does not show the location of the road, does it?

(By Mr. KNIGHT:)

A. Oh! yes.

By the COURT: What date did you say?

(By Mr. KNIGHT:)

A. December, 1889.

Q. Has there ever been any other map made since by the city of Tampa, on file in the records of Hillsborough county?

A. No, sir. There has been maps of portions of the city filed.

And the defendant, further to maintain the issues on its part, introduced in evidence as a witness, one J. H. NEFF, who being duly sworn, testified as follows:

Q. You may state your name.

A. James H. Neff.

Q. What official position, if any, do you hold, in the city of Tampa?

A. City engineer.

Q. For what time?

A. Four years.

Q. Mr. Neff, are you acquainted with the price paid for hauling, excavating and filling in of sand, per cubic yard, in the city of Tampa, the past four years?

277 A. Yes, sir.

By Mr. BISBEE: Objected to by counsel for plaintiff. Defendant closed his case without any attempt to rebut the testimony of the engineer, which I examined on that subject. If I had been given any notice, if I had been apprised of it, I would have been prepared to rebut that testimony.

The court permits the case to be open for the introduction of

more testimony. Let the witness testify, but be more confined to the facts and circumstances of this particular case, not generally.

Q. Do you know what it is worth?
A. Yes, sir.

Objected to by counsel for plaintiff. Objection overruled. Exception noted.

Q. Do you know, Mr. Neff, what it is worth per cubic yard to procure and fill in soil in the vicinity of this location?
A. Which part of the Bell tract is it?
Q. Where the railroad runs, just that part occupied by the railroad.

By the COURT: About 1,424 feet long, from a point on Marion street, extending westwardly, 1,424 feet, just that part on lot eight, occupied by the railroad?

A. Depends entirely upon where they get the material to fill in.
Q. With your knowledge of where they can procure the material from in this city?
A. Ought to be done for twenty-five or thirty cents per cubic yard, and if they can get the material at close haul could be done for twenty cents.

By Mr. KNIGHT: Would you honor permit me to show the prices that have been paid in this city in the last four years?
278 By the COURT: A similarity of conditions?
By Mr. KNIGHT: All that I desire to show is, that he bases his calculation on what they have been paying here for the last four or five years.

Q. Mr. Neff, what are you by occupation?
A. Civil engineer.
Q. To cut a subdivision up into lots and blocks, with alleys of fourteen feet in width and streets of sixty feet in width, how much of the subdivision would it take for the streets and alleys, in acreage?
A. Depends entirely, sir, upon the size of the blocks.
Q. I mean blocks to be two hundred and ten feet square, an alley through it and sixty-foot street.
A. Would be almost as much as the territory included in the streets and alleys, as there is in the block proper.
Q. Mr. Neff, do you know where the lot of W. A. Carter is?
A. Yes, sir.
Q. Do you know where the lot of T. C. Taliaferro is?
A. Yes, sir.
Q. You may state on what streets those lots front and the width of those streets?
A. The width of the streets are eighty feet. I believe they are on Morgan street.
Q. What street does T. C. Taliaferro's lot face?
A. He faces west on Florida avenue.

Q. How wide is the street?
A. Eighty feet.
Q. He faces on the south, on what street?
A. Whiting street.
Q. How wide is it?
279 A. Eighty feet.
Q. Mr. Carter's lot immediately back of his?
A. Yes, sir.
Q. His house faces on what street on the south?
A. Whiting.
Q. On the east?
A. Marion.
Q. And how wide is it?
A. Eighty feet.

The defendant closes.

By Mr. BISBEE: May it please the court, the counsel for defendant introduced the record of the condemnation proceedings in evidence. I wish to read a short paragraph from the articles of association of this company in 1888. The following is a copy of the paragraph from the articles of association, read by Col. Bisbee, counsel for plaintiff:

"From Waldo in the county of Alachua through the counties of Alachua, Marion, Sumter, Hernando, and Hillsborough to Plant City in said county of Hillsborough."

And the plaintiff, in rebuttal, introduced as a witness one J. B. SECKINGER, who being duly sworn, testified as follows:

Q. What is your name?
A. John B. Seckinger.
Q. Where do you live?
A. Tampa.
Q. How long have you lived here?
A. Nearly eleven years.
Q. What is your business or occupation?
A. Groceryman.
Q. How long engaged in that business?
A. All my life nearly.
280 Q. How long have you lived in Tampa, did you say?
A. Nearly eleven years.
Q. Have you bought and sold real estate in Tampa?
A. Yes, sir.
Q. Have you bought or sold any real estate near the lot in question in this case?
A. Not nearer than this block over the way.
Q. About how far away?
A. About three blocks.
Q. Are you acquainted with the values of real estate in the city of Tampa?
A. Yes, sir. To some extent.

Q. Do you own any real estate near this lot in question?
A. Yes, sir. We own one acre in the reservation.
Q. What do you consider land worth in that vicinity?

Counsel for defendant object to the witness answering on the ground that he has not sufficiently qualified himself.

Objection withdrawn.

By the COURT: He can state actual facts as to what he paid for that property or what he can sell it for.

Q. Please state what you consider property worth in that vicinity, not your own property, any property, or the property where the railroad crosses?

A. I think as much as the railroad property. Our block is on the other side and farther up.

Q. That is east.

A. Yes, sir. I consider it valuable property myself.

Q. How valuable? How much would you take for it?

281 A. We were offered eighty acres a small distance out of town yesterday, for just one-quarter of it. I would not take today less than three thousand dollars for that land we own there. I think it worth four.

Q. Is it not a fact that this lot eight is worth more money?

A. I think it is worth more money down this way.

Cross-examination:

Q. Where is your acre situated?

A. I don't remember the numbers. It is about one block the other side of the railroad, three or four streets above here.

Q. Who did you buy it from?

A. From Julius Cæsar.

Q. From Julius Cæsar's tract?

A. Yes, sir.

Q. Adjoining the railroad?

A. No, sir. Down farther.

Q. When did you buy it?

A. Last year, about a year ago.

Q. What did you pay for it?

A. I can't tell. It was a trade. I can't tell exactly how much.

Q. What did you trade for it?

A. Traded some paper and got some money. The man we bought it from was in very hard circumstances, and so we bought it cheaper than we could any other way.

282 Q. Who did you buy it from?

A. Julius Cæsar.

Q. How much money did you give him, fifty dollars?

A. I don't remember.

Q. One hundred?

A. I don't remember.

Q. One hundred and fifty?

A. I can't say.

Q. Did you give two hundred?

A. Mr. Gunn attended to that matter, and naturally I don't remember it. So I don't know what we paid him for it.

Q. Did you give him more than one hundred and fifty?

A. Yes, sir.

Q. Would you say that you gave him two hundred in money?

A. I think, perhaps, a great deal more than that. He came in several times and got money.

Q. He owed you money?

A. Yes, sir. We had to have our money and we came in on him.

Q. Who is Julius Cæsar?

A. An old colored man.

Q. He had no means except this lot?

A. I don't know of any means.

Q. Do you know of any means except that?

A. I do not know about that.

Q. Did you take any security for the money you loaned him from time to time?

A. I think we had a mortgage and note.

283 Q. Is it not a fact that you loaned Julius Cæsar money from time to time for the purpose of enabling him to procure that homestead from the Government?

A. He got it to live on.

Q. Is it not a fact?

A. I don't know, sir. I don't know what he did with the money.

Q. During the time he was an applicant for this property, and it was in litigation, you loaned him money in small amounts?

A. I think we let him have money, but I don't know what the money went for. I think he was getting the money to live on.

Q. Did you have any security besides the note?

A. I think we had Lucius Finley on the note.

Q. Lucius Finley was his *his* counsel in procuring that tract of land?

A. I don't know that, sir. I am not sure it was Lucius Finley. I told him he must get us security or we would not let him have more money.

Q. You let him have groceries?

A. Yes, sir.

Q. And what paper did you take?

Objected to by counsel for plaintiff.

Q. Do you know of any other property that has been sold there in the last seven years, Mr. Seckinger, for any price?

A. I think not. Not that I can recall right now.

Q. Do you know of any property that has been leased there in the last seven years for ground rent?

A. No, sir.

284 Redirect:

Q. You purchased before Cæsas obtained this patent, did you not?

A. Yes, sir.

And thereupon the plaintiffs, further to maintain the issues on their part, introduced as a witness one H. C. CARUTHERS, who, being duly sworn, testified as follows:

Q. What is your name?
A. H. C. Caruthers.
Q. Where do you live?
A. On the corner of Pierce and Whiting streets.
Q. Do you know of anything of the land in question here, where the F. C. & P. is?
A. Just south of me.
Q. Do you know the location of the Standard Oil Company?
A. Just side of me, sir.
Q. You are right there?
A. The Standard Oil Company are right on Pierce street.
Q. When did you buy that property?
A. Year ago.
Q. How much?
A. Four hundred and fifty cash.
Q. Who did you buy of?
A. Livingston, through Beckwith and Henderson.
Q. What Beckwith was that?
A. Beckwith and Henderson.
Q. A witness yesterday?
A. Yes, sir.

285 Cross-examination:

Q. Have you got any interest in the reservation, in any way, shape or manner?
A. No, sir.
Q. Do you know Mrs. Finley?
A. Yes, sir.
Q. Do you represent her, in any way, shape or manner, in the sale of her property?
A. No, sir.
Q. Mrs. Finley owns a part of the Fort Brooke reservation?
A. Yes, sir.
Q. She is the wife of Lucius Finley, deceased?
A. Yes, sir.
Q. Lucius Finley represented a number of the squatters in obtaining their title?
A. Yes, sir.
Q. Did you not represent her?
A. If she asked me for advice about anything.
Q. About the distribution of her property?
A. When she asked me.
Q. What business are you engaged in?
A. Shipping clerk, Phillips and Fuller.

And the plaintiffs further to maintain the issues on their part, introduced as a witness, one F. J. LA PENOTIERE, who being duly sworn, testified as follows:

Q. Where do you reside?
A. In Tampa.
Q. How long have you resided here?
A. Nearly fifteen years.
Q. What has been your business and occupation during that time?
286 A. I am an attorney by profession. Also deal in real estate.
Q. How long have you been engaged in the real-estate business during that time?
A. Commenced about four or five years ago.
Q. How long a time?
A. Quite a long time. Almost when I first came here, went into the real-estate business. Might say ten years, more or less.
Q. Did you become acquainted with the values of real property in the city of Tampa, during that time?
A. I should judge so. Yes, sir.
Q. Do you consider yourself a judge of the value of real estate?
A. I should think so.
Q. Do you know the location of the land? The land in question in this city?
A. I think I do. The Bell land.
Q. How long have you known it?
A. Ever since I have been here.
Q. Are you acquainted with the value you put on it with others, any time in 1889, when testimony was taken in Gainesville touching this reservation?
A. There was a value put upon it with others.
Q. If you know the value put upon it by you and others, state it.
A. About four thousand dollars an acre at that time.
Q. Who were the persons you conferred with at that time?
A. I don't know as I conferred with anybody.
Q. Did you talk with Mr. Lesley, the present collector, and Mr. Taliaferro?
287 A. I don't think I did. I don't think I conferred with anybody, not specially.
Q. How do you know what the others put upon it?
A. I attended that examination in Gainesville, in the fall of 1889.
Q. Now, Mr. Laponetiere, assuming that you had been called upon, under oath, the first of January, 1890, to appraise the value of this property, which the railroad crosses, what would you put it at per acre?
A. About four thousand dollars an acre.
Q. State to the court what uses and purposes that land is adapted to.
A. It is adapted at the present time now along the railroad for business purposes.

Q. Before the railway was there adapted for residence purposes, more adapted for residence purposes?
A. Yes, sir.
Q. Do you know anything about the value of lands for agricultural purposes in that vicinity?
A. Yes, sir.
Q. Large vegetable crops raised in this vicinity?
A. Not very. At the present time our best crop is celery.
Q. What others?
A. Vegetable growing.
Q. State whether or not this land was valuable for agricultural purposes at that time.
A. I never tried it. It was very good land for gardening.
Q. Very good?
A. I think so.
Q. Not a light sandy soil?
A. What you might call a sandy hammock.
288 Q. Do you remember the old original Mr. Bell?
A. Very well.
Q. Were you on his place while he was living, where he was living?
A. Often.
Q. You remember of seeing his orange grove there?
A. Very nicely planted around the house and a garden.
Q. What was the condition of the orange grove?
A. Very thrifty, very well.
Q. Have you any estimate of the number of orange trees?
A. Couldn't tell. Sometimes pretty well filled. Good orange trees.
Q. A number of orange trees?
A. Quite a number.

Cross-examination:

Q. You say that his trees are nicely planted out?
A. No, sir. I didn't. I said they looked very thrifty.
Q. You say you are a lawyer, practicing your profession now?
A. No, sir; for some time.
Q. About how long?
A. Three or four years.
Q. What is your profession now?
A. Not doing anything particular.
Q. For how long?
289 A. Had a suit the other day, by the way, that I was attending to. But it was for my brother; you could hardly call it business.
Q. Is it not a fact that for the past six years you have not been in the real-estate business or law business?
A. No, sir; I do not think I could go so far back as that. I couldn't tell you exactly.
Q. Are you a property-owner in this city?

A. No, sir.

Q. Have you, within the past five years, sold any property at all, as agent for anybody else?

A. No, sir.

Q. You say that you were at witness at Gainesville?

A. No, sir; I said I attended there. I don't think I said I was a witness. I was there as a representative for Mr. Maylor, for a claim he had on the reservation.

Q. What did he lay claim to?

A. Like all the others, he claimed the whole of it.

Q. And you were there, representing him as his attorney?

A. I did.

Q. When you spoke about a valuation put upon this reservation, explain to the court what you meant?

A. I meant the whole reservation. One hundred and forty-eight acres.

Q. The whole reservation of 148 acres?

A. Yes, sir.

Q. Now, would you say there was any difference between lots in the reservation on the Hillsborough river, the channel and the Bell tract?

A. I think so.

Q. Which is the more valuable?

A. The river-front lots of course.

290 Q. How much more valuable are the river-front lots, than the lots in the Bell tract?

A. That is very difficult to say. Very difficult, Mr. Knight. Very difficult question to answer. I could hardly have an opinion, exactly. Couldn't tell exactly.

Q. Be worth twice as much?

A. Yes, sir; I should say.

Q. Be worth five times as much?

A. Possibly.

Q. You said the Bell land was a hammock?

A. I think it resembles that.

Q. What do you call a hammock?

A. Land on which hardwood grows. What you call scrub-oaks, still small oaks.

Q. How many oak trees, if any, were growing on the Bell tract?

A. It has been cleared off.

Q. When cleared off?

A. It is not a wooded hammock at the present time.

Q. Is it not a fact that the Bell tract has never been a hammock?

A. Hammock soil, what I meant by hammock soil, there is no wood on it at all.

Q. Is it not a fact that with the exception of a slight portion of that land, in and around the Bell enclosure, that the balance of that land is all sand, and not hammock at all?

A. I call it light hammock soil and I think that is very well understood in Florida.

And the plaintiffs, further to maintain the issues on their part, introduced as a witness one GARRET, who had been previously sworn as a witness, who testified as follows:

291 Q. State what that paper is (handing witness a paper).

A. That is a copy of the location of the F. C. & P. railroad through lot eight, made by the company's engineer.

Q. Did you ever have any talk with Blair Burwell, chief engineer, about that map?

Objected to by counsel for defendant.

By Mr. KNIGHT: The statement of Blair Burwell could not bind this company.

Q. How did you obtain that map?

A. I didn't obtain it direct from the company's engineer. It was sent here to somebody, I have forgotten who. He told me it was sent here to somebody. But I gave it to Captain Walton, the real-estate agent here, some four or five months ago.

Q. He told you there was a map sent here?

A. Yes, sir. That is the identical map. I had to produce this map. There was a discrepancy, and to prove my position I had to produce this map. He acknowledged that this was his map and I was correct.

Q. Is that what is called a blue-print map?

A. It is sensitised and printed by the sun. A copy is made on translucent paper placed over this. It purports to be made in 1893, and cannot fail to be a true copy from the very nature of the way it was taken. It is entirely a copy of the map which this company filed in the land office.

Q. I want to show the day it was made.

By the COURT: Does not that one show the day when it was made?

By Mr. BISBEE: I don't think so, if that one does not show
292 the day when it was made. I beg your honor's pardon; it does show.

Mr. KNIGHT: Moved by the counsel for defendant that the statement of the witness be stricken.

By the COURT: The court knows that.

By Mr. BISBEE: The court cannot render a judgment in ejectment in favor of the plaintiff, unless I establish how much of this piece of the Bell land is in the right of way.

Q. I wish you would state, taking these maps together, how much of the right of way of that two hundred feet, the plaintiffs are in possession of.

Objected to by counsel for defendant because it has already been proven and not in rebuttal. Objection is withdrawn.

Q. I want you to state to the court how much of that piece, (the piece of Bell,) is within the right of way of the two hundred feet wide?

A. All of it.

Q. How much area?

A. All of that lot is in possession of the plaintiffs.
Q. All of that lot? How much is the area of that?
A. About half an acre.
Q. Is the dimensions given there?
A. No, sir. But I remember that. Exactly one hundred feet from the center of the track to the south side of Whiting street, and this is two hundred and ten feet and seventy feet to the ditch here. (The witness explains these dimensions on the map.)

And this was all the evidence given in said cause.

And during the progress of said couse, the said defendant asked for leave to file certain additional pleas, which were offered for filing on the 5th day of March, A. D. 1897, and are set forth in the record, said pleas being numbered 2nd, 3rd, 4th and 5th.

293 The second plea of defendant being a plea to the jurisdiction of the court, and being as follows: 2nd. Now comes the defendant in the above-stated cause, and for a further plea filed by leave of court, says, that this honorable court has no jurisdiction and did not have any jurisdiction at the time of the commencement of this suit to entertain said suit, and that defendants admits that before the commencement of this suit, that a patent was issued from the United States to Louis Bell and his heirs to all of lot (8) eight, section 24, township 29 south, range 28 east, and that plaintiffs claim title to said land described in the declaration, as heirs of said Louis Bell, under said patent, and this defendant says it is not true that the defendant, at the time of the commencement of this suit claimed and insisted that the plaintiffs derived no title to the said land under and by virtue of the said patent, and it is not true that at said time or any time since, the defendant claimed under the laws of the United States of America, or that under an act of Congress, entitled, "An act granting public lands in alternate sections of the States of Florida and Alabama, to aid in the construction of certain railroads in said States," approved May 17th, 1886, or under an act of Congress, entitled An act to provide for the disposal and abandonment of useless military reservations, approved July 8th, 1895, or any other act of Congress, or law of the United States, any right, title or interest in said land, or to locate the route of its railroad and construct the same through said land, but this defendant admits that now and at the time of the commencement of this suit, it had no claim of title and that it does not now and did not at the time of commencement of this suit assert any claim or title to said land, under any act of Congress or law of the United States. Wherefore, defendant says that this honorable court should not longer entertain jurisdiction of said suit, and said suit should be dismissed.

294 The third plea of the defendant setting forth the fact that Matilda P. Fiehe was a person *non compos mentis* and insane, and that she could not maintain the said suit.

The fourth plea setting forth the fact that in December, 1889, and in January, 1890, the defendant located and constructed its road, took possession of its right of way across and through the lands described in plaintiffs' declaration, laid its tracks thereon and con-

tinuously, ever since maintained and operated said railroad thereon, and that on the 21st day of December, 1896, it filed its proceedings and petition in the circuit court of the sixth judicial circuit, in and for Hillsborough county, State of Florida, for the purpose of having valued and condem-ed the said lands, and to acquire title under its right of eminent domain, under the laws of the State of Florida; that process was duly issued, the cause pending, etc., and that in and by said proceedings and judgement of the said court therein, the defendant would acquire title of the plaintiffs to the said property and compensation, etc., awarded to plaintiffs.

The fifth plea setting forth the fact that on the 21st day of January, 1890, the complainants and those under whom they claimed as heirs-at-law filed their original bill, in the United States court for the southern district of Florida, on the equity side and enjoined defendant from constructing and operating its railroad across said land and that on the 2nd of January, 1890, his honor, Don A. Pardee, circuit judge, issued an order on said bill for temporary injunction against defendant, but providing upon defendant's filing its bond in the sum of five thousand dollars, said injunction should be dissolved, or on the defendant acquiring title under condemnation proceedings, under the laws of the State of Florida, and that said defendant did file the said bond, which was approved by the clerk of the court, and that on the 22nd day of December, 1896,
295 the plaintiffs in this suit, by leave of the court filed their supplemental bill, in the said above-mentioned equity cause in this court, setting up the former proceedings in the original bill and that they, as heirs-at-law of Louis Bell, had acquired a patent to said land from the United States, and praying for an injunction against the defendant, using or occupying any portion of said land, or from running and operating its railroad upon said land, and that defendant be decreed to have no right to condemn any part of said land, under the laws of eminent domain of the State of Florida and to enjoin same, and for compensation to complain-t for value of the said land and to remove said railroad from said lot, and for compensation for the use and occupation of the said land by the defendant and for waste and damage alleged to have been committed on said lot by defendant.

And that on February 1st, 1897, defendant filed its answer to the supplemental bill, setting up its defense thereto, and also alleging that it had commenced proceedings in the circuit court of the sixth judicial circuit, Hillsborough county, State of Florida, for the purpose of condemning said property under the laws of eminent domain of the State of Florida, and that said equity cause involves the title to the same land and in all respects the same subject-matter and the same relief as this suit, and that said equity cause is still pending and being prosecuted by the plaintiffs.

But said judge did then and there, to wit, on the 18th day of February, A. D. 1897, deliver his opinion and decide that said motion to file additional pleas should be denied, for the reason that none of said pleas constitute a good defense to said action, that could not as well be shown in the original plea of not guilty, to which

said opinion and decision, defendant by its attorneys did then and there except.

And, further during the progress of said cause to wit, on
296 the 5th day of March, 1897, the defendant by its attorneys, did move the court to dismiss said cause for the reason that there was nothing upon the face of the declaration, to show that the court had jurisdiction to hear and determine the said cause.

But the court did then and there, to wit, on the 5th day of March, deny said motion and hold that said case should be proceeded with. To the ruling and decision of the said judge the defendant by its attorneys did then and there except.

And during the progress of said cause, to wit, on the 5th day of March, 1897, the defendant did move for a continuance of said cause, upon a motion filed upon the affidavit of Peter O. Knight, one of the attorneys for the defendant, said motion setting forth the fact that the defendant company had been in possession of the land described in the plaintiffs' declaration, since 1889; that it had constructed and was operating its line of railway over the same, and that after the issuance of the patent from the United States Government to the heirs of Louis Bell, it had in good faith instituted condemnation proceedings against the plaintiffs; that the use of said land was absolutely necessary for its business and that said condemnation proceedings were being prosecuted in good faith.

But the court did deny the said motion of the said defendant for a continuance, and did hold that the said cause should be proceeded with, to which ruling and decision of the said judge, the defendant, by its attorneys, did then and there except.

During the trial of said cause the defendant, by its attorneys, did offer in evidence the original equity suit, instituted by Louis Bell against the defendant company, in December, 1889, and
297 which proceeding is partially set forth in the 5th additional plea, proposed to be filed by the defendant, and which was denied by the court, for the purpose of showing that defendant entered into possession of the said land in good faith, and under the order and permission of the Honorable Don A. Pardee, United States circuit judge. But the said judge did then and there refuse to permit the defendant to introduce in evidence said chancery proceedings, to which ruling of the said judge, the said defendant, by its attorneys, did then and there except.

And the court did then and there, to wit, on the 23rd day of March, A. D. 1897, find as *as* a matter of law that the plaintiffs were entitled to the possession of and have a fee-simple title to and in said land, hereafter described, and the undivided interest- of the plaintiffs in and to the said lands are as follows, to wit: William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell and Matilda P. Fiehe (*née* Bell), have and own each one undivided sixth part and interest in the said land, and that George A. Bell and Simon Bell, have and own each one undivided twelfth part and interest in said land.

And the court further finds, as a matter of law, that the plaintiffs have at all times, within seven years next before the commence-

ment of this action, been entitled to the exclusive possession of said tract or lot of land hereinafter described, and is entitled to such amount, in the form of judgment for damages and mesne profits, as will fully compensate them for any damages that have been sustained, and any loss of rents or profits which have been caused by the unlawful possession and trespass of the defendant herein.

And the court further finds, as a matter of fact, that in damages and in loss of rents and profits the plaintiffs have been in-
298 jured and damaged to the extent of $1,955, one thousand nine hundred and fifty-five dollars.

And the court finds, as a mixed matter of law and fact, for the plaintiffs, and that they should have judgment for the shares and portions as found in the first finding, to wit: William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell and Matilda P. Feihe (*née* Bell), each one-sixth part, and George A. Bell and Simon Bell, each one-twelfth part in fee-simple interest in and to the following-described lot or tract of land, to wit, a strip or parcel of land, being a part of lot 8, section 24, township 29 south, range 18 east of the meridian of Tallahassee, State of Florida and county of Hillsborough, known and described as follows, to wit: Beginning at a point in the east boundary line of said lot 8, at a distance of 75 feet in a south direction from the N. E. corner of said lot, running southwesterly parallel to the northwesterly boundary line of said lot to the western boundary line of said lot 8 (1,424 ft.) fourteen hundred and twenty-four feet; thence south on said western boundary line 75 feet; thence northeasterly on a line parallel to the said northwestern boundary line of said lot to the eastern boundary line of said lot; thence north along said eastern boundary line 75 feet to the place of beginning; and the court further assesses their damages for injury, use and occupation, while said land has been held and occupied by said defendant company, at $1,955, for which judgment should be given.

To which findings of law and fact the defendant then and there excepted, and complains and alleges that the court erred therein.

Whereupon the court aforesaid, on the 23d day of March, 1897, did render judgment in favor of the plaintiffs and against the defendant, as set forth aforesaid, and awarding judgment in the amount of $1,955 and costs against the defendant, as appears of record.

299 And inasmuch as the said several matters above mentioned, objected to and insisted upon and considered by the court, do not appear by the findings of record and judgment aforesaid, the defendant, by its attorneys, did then and there propose this its bill of exceptions, to the said findings and decisions of the said judge, and requested him to sign the same, according to the form of the statute, in such case made and provided, which is done this sixteenth day of April, A. D. 1897.

Signed and sealed the day and year last above written.

JAMES W. LOCKE, *Judge.*

W. J. Bell *et al. vs.* Florida Central and Peninsular Railroad Co. Bill of exceptions. Filed April 16, 1897. E. O. Locke, clerk, by Louis Starke, D. C.

300 In the United States Circuit Court of Appeals, Fifth Circuit.

THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY, Plaintiff in Error,

vs.

WILLIAM J. BELL, JOHN W. BELL, FRANK A. BELL, ELIZA A. Bell, Matilda P. Feihe and Her Husband, Antone Feihe, George A. Bell, and Simon Bell, Defendants in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, Matilda P. Feihe and her husband, Antone Feihe, George A. Bell, and Simon Bell:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals, 5th circuit, to be holden at New Orleans on the 10th day of May, A. D., 1897, pursuant to writ of error filed in the clerk's office of the circuit court, fifth circuit, in and for the southern district of Florida, wherein The Florida Central and Peninsular Railroad Company, a corporation under the laws of the State of Florida, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment on
301 the said writ of error mentioned should not be corrected, and speedy justice should not be done to the party in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal
[SEAL.] of said fifth circuit in and for the southern district of Florida, at the city of Jacksonville, in said district.

Given this 10th day of April, A. D. 1896.

JAMES W. LOCKE, *Judge.*

Attest: EUGENE O. LOCKE, *Clerk.*

Marshal's Return.

Received the within writ at Tampa, Florida, April 17th, 1897, and executed same by personal service on the following-named persons, viz: Eliza A. Bell, agent for William J. Bell; John W. Bell, Frank A. Bell, Eliza A. Bell, Antone Feihe, Matilda P. Feihe, on her husband, Antone Feihe; George A. Bell, Simon Bell.

JAMES McKAY,
U. S. Marshal.

JOHN McKAY, *Deputy.*

Also served within citation at Jacksonville, Fla., April 21st, 1897, by delivering a true copy of this citation to Horatio Bisbee, attorney of record of the within-named defendant in error.

JAMES MACKAY,
U. S. Marshal.

Endorsed: William J. Bell *vs.* Florida Central and Peninsular Railroad Company. Citation. Filed April 22d, 1897. Eugene O. Locke, clerk.

302 In the United States Circuit Court of Appeals, Fifth Circuit.

THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY, Plaintiff in Error,
vs.
WILLIAM J. BELL, JOHN W. BELL, FRANK A. BELL, MATILDA P. Fiehe and Her Husband, Antone Fiehe; George A. Bell, and Simon Bell, Defendants in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges or the circuit court, fifth judicial circuit of the United States, southern district of Florida, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, Matilda P. Fiehe, and her husband, Antone Feihe, George A. Bell, and Simon Bell, plaintiffs, and The Florida Central and Peninsular Railroad Company, a corporation under the laws of the State of Florida, as defendant, a manifest error hath happened, to the great damage of the said Florida Central and Peninsular Railroad Company, as by its complaint appears, we, being willing that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this
303 behalf, do command you, if judgment — herein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you may have the same at New Orleans on or before the 10th day of May, A. D. 1897, in the said United States circuit court of appeals, fifth circuit, to be then and there held, that, the record and proceedings aforesaid being inspected, the said United States circuit court of appeals, 5th circuit, may cause further to be done therein to correct that error what of right and according to law and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the
[SEAL.] seal of the United States circuit court, 5th circuit in and for the southern district of Florida, at the city of Jacksonville, in said district, this 10th day of April, A. D. 1897.

EUGENE O. LOCKE, *Clerk.*

Allowed in open court this 10th day of April, A. D. 1897.

JAMES W. LOCKE, *Judge.*

304 I, Eugene O. Locke, clerk of the circuit court of the United States, fifth judicial circuit, southern district of Florida, do hereby certify that the foregoing pages numbered from one to three hundred and three, both inclusive, constitute a true, full and complete transcript of the record, judgment, bill of exceptions, assignment of errors, exhibits and all proceedings in the case of William J. Bell *et al.*, plaintiffs, against The Florida Central and Peninsular Railroad Company, defendant, as the same appear from the files and records of my office.

Witness my hand and the seal of the said circuit
[SEAL.] court, at the city of Jacksonville, this 30th day of April, A. D. 1897.

E. O. LOCKE, *Clerk.*

305 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1897.

MAY 9TH, 1898.

(Extract from minutes.)

THE FLORIDA CENTRAL AND PENINSULAR RAILROAD Company
v.
WM. J. BELL ET ALS. } No. 599.

This cause was regularly called this day and submitted to the court after argument by Mr. W. W. Howe and Mr. J. C. Cooper for plaintiff in error, and by Mr. H. Bisbee for defendant in error.

November Term, 1897.

TUESDAY, *May 24th*, 1898.

(Extract from minutes.)

THE FLORIDA CENTRAL AND PENINSULAR RAILROAD Company
v.
WM. J. BELL ET ALS. } No. 599.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Florida, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, The Florida Central and Peninsular Railroad Company, and the sureties on the writ of error bond herein, W. Bayard Cutting
306 and H. Rieman Duval, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

May 24, 1898.

307 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1897.

THE FLORIDA CENTRAL AND PENINSULAR RAILROAD Company, Plaintiff in Error,
vs.
WILLIAM J. BELL ET AL., Defendants in Error.
No. 599.

Error to circuit court of the United States for the southern district of Florida.

Before Pardee and McCormick, circuit judges, and Swayne, district judge.

McCORMICK, circuit judge, delivered the opinion of the court:

This case is brought here on a writ of error to the circuit court of the United States for the southern district of Florida. The declaration, filed in that court December 29, 1896, is as follows:

"William J. Bell, John W. Bell, Frank A. Bell, who at and before the time this suit was commenced were citizens of the State of Texas; E. A. Bell, Matilda P. Feihe (*née* Bell), all heirs of and children of Louis Bell, late of Hillsborough county, State of Florida, deceased; George A. Bell and Simon Bell, heirs of and grandchildren of the said Louis Bell, and Antone Feihe, the husband of said Matilda P. Feihe, plaintiffs, by H. Bisbee and Padgett & Forrest, their attorneys, sue The Florida Central and Peninsular Railroad Company, a corporation organized and existing under the laws of Florida, the defendant, because the defendant heretofore, to wit, in the year 1890, took possession of, as its railroad bed and right of way, and built its railroad of four tracks across and through and upon a strip and parcel of land, being a part of lot 8, section
308 24, township 29 south, of range 18 east, according to the surveys, maps, and plats thereof made by the Government of the United States, and under and according to the laws of the said United States, which said lot 8 is in Hillsborough county, State of Florida, and in the said southern district of Florida, which said strip and parcel of land so taken as aforesaid by the defendant, and which the said defendant is in possession of and was in possession of at the time of the commencement of this suit, contains about seven acres, of the value of $30,000, to which the plaintiffs claim title; and the defendant has received the rents and profits of said land since the first day of December, 1889, of the yearly value of $4,000, and refuses to deliver the possession of the said land to the said plaintiffs, or to pay the rents or profits thereof; and the said plaintiffs allege that in and by the construction of its said railroad upon, over, and through the said strip and parcel of land by the defendant, the defendant has dug up the said land in making its road-bed, and has taken away and removed the plaintiffs' fences thereon and the soil and sand thereof, and other wrongs and trespasses and injuries to the said land and to the plaintiffs' possession and freehold committed, to the plaintiffs' damage of $10,000, ex-

clusive of such rents and profits, which the defendant neglects and refuses to pay to the plaintiffs.

"And the plaintiffs allege that they claim title to the said land under and by virtue of a patent granted by the Government of the United States of America to the said Louis Bell and his heirs, upon a pre-emption claim for said land under the laws of the United States, originally commenced and filed in the local land office of the United States of America at Gainesville, Florida, in 1883, and prosecuted by the heirs of the said Louis Bell and his heirs, the plaintiffs, in said land office, and upon appeal in the General Land Office of the Government, and upon and from an appeal from the decision of the Commissioner of the said General Land Office to the Secretary of the Interior of the United States the said heirs
309 prosecuted the pre-emption claim until by the order and decision of the said Secretary the said patent was granted; and the plaintiffs allege that at various and sundry times during the said prosecution of the said pre-emption claim in the General Land Office aforesaid and in the office of and before the said Secretary the defendant claimed, insisted, and contended that the plaintiffs were not under any of the laws of the United States entitled to have a patent to said land granted to the said Louis Bell and his heirs; and the said defendant, at the time of the commencement of this suit, claimed and insisted that the plaintiffs derived no title to the said land under and by virtue of the patent, and at said time claimed that under the laws of the United States of America, and especially under and by virtue of the first section of an act of Congress entitled 'An act granting public lands in alternate sections to the States of Florida and Alabama, to aid in the construction of certain railroads in said States,' approved May 17, 1856, it was entitled and had the right to locate the route of its railroad and construct the same through the said lands, and to be in possession thereof, on the ground, among other grounds, that the said section 8 was a part of that tract of land which constituted at one time a military reservation, known as the Fort Brooke military reservation, at Tampa, State of Florida.

"And the plaintiffs allege that after the passage of an act of Congress entitled 'An act to provide for the disposal of abandoned and useless military reservations,' approved July 5, 1885, they contended for and claimed title to and a patent to the said parcel of land under and by virtue of the first proviso of the second section of the last-mentioned act of Congress, both in the office of the said General Land Office and of the Secretary of the Interior, and the defendant appeared in both of the said offices, by its counsel, and there claimed and contended, and at the commencement of this suit claimed and contended, that the plaintiffs were not entitled to a patent or title to said parcel of land under the said proviso of the said act of Congress, and at the times aforesaid it claimed and insisted that it was entitled to locate the route of its railroad through said parcel of land
310 and to be in the possession thereof under and by force of the third proviso of the aforesaid act of Congress approved May 17, 1856, to the plaintiffs' damage of $40,000."

To this declaration the Florida Central and Peninsular Railroad Company, the plaintiff in error, on February 1, 1897, submitted the following plea: "Now comes the defendant in the above-entitled cause, by John C. Cooper, its attorney, and for a plea to plaintiffs' declaration says it is not guilty as alleged in said declaration."

On February 5 the defendant moved the court for leave to submit additional pleas, as follows:

"2. Now comes the defendant in the above-stated cause, and, for a further plea, filed by leave of court, says that this honorable court has no jurisdiction, and did not have any jurisdiction at the time of the commencement of this suit, to entertain said suit, and defendant admits that before the commencement of this suit a patent was issued from the United States to Louis Bell and his heirs to all of lot 8, section 24, T. 29 S., R. 28 E., and that the plaintiffs claim title to said land described in the declaration as heirs of Louis Bell under said patent; and this defendant says it is not true that the defendant at the time of the commencement of this suit claimed and insisted that the plaintiffs derived no title to the said land under and by virtue of the said patent, and it is not true that at said time or at any time since the defendant claimed under the laws of the United States of America or under an act of Congress entitled 'An act granting public lands in alternate sections of the States of Florida and Alabama, to aid in the construction of certain railroads in said States,' approved May 17, 1886, or under an act of Congress
entitled 'An act to provide for the disposal and abandon-
311 ment of useless military reservations,' approved July 5, 1885,
or any other act of Congress or law of the United States, any right, title, or interest in said land, or to locate the route of its railroad and construct the same through said land; but this defendant admits that now and at the time of the commencement of this suit it had no claim or title and that it does not now and did not at the time of the commencement of this suit assert any claim or title to said land under any act of Congress or law of the United States. Wherefore the defendant says that this honorable court should no longer entertain jurisdiction of said suit, and said suit should be dismissed.

"3. And for further plea defendant says that the plaintiff Matilda P. Feihe is a person *non compos mentis* and insane, and cannot maintain the said above-entitled suit.

"4. And for a further plea defendant says that in December, 1889, and in January, 1890, it located and constructed its road and took possession of said right of way across and through said lot 8, section 24, township 29 south of range 28 east, described in the plaintiffs' declaration, and laid its tracks thereon, and has continuously ever since maintained and operated said railroad thereon, and that on the 21st day of December, 1896, it filed its proceedings and petition in the circuit court for the sixth judicial circuit in and for the county of Hillsborough, State of Florida, for the purpose of having valued and condemned the said land, and to acquire title under its right of eminent domain under the laws of the State of Florida, and that process was duly issued upon the said petition

and proceedings as required by the laws of the State of Florida, directed to the plaintiffs in this suit as defendants to said proceeding, and the said process has been served upon said defendants, who have answered the said petition, and said proceedings are now pending and undisposed of in said court, and that in and by the said proceedings and the judgment of said court thereof this defendant will acquire the title of the plaintiffs to the said property, and the compensation will be awarded and paid there-
312 under to the plaintiffs for their right, title, and interest in the said property.

"5. And for a further plea defendant says that theretofore, to wit, on the 21st day of January, 1890, the complainants and those under whom they claim as heirs-at-law filed their original bill in this honorable court, on the equity side, to enjoin the defendant from constructing and operating its railroad across said land, and that on the 2nd day of January, 1890, his honor Don A. Pardee, circuit judge, issued an order on said bill for a temporary injunction against the defendant, but providing that upon the defendant's filing its bond in the sum of $5,000 said injunction should be dissolved, or on the defendant's acquiring title under condemnation proceedings under the laws of the State of Florida; that said defendant did file the said bond, which was approved by the clerk of this court, through his deputy clerk, at Tampa, Florida, and that on the 22nd day of December, 1896, said plaintiffs in this suit, by leave of court, filed their supplemental bill in the said abovementioned equity cause in this court, setting up the former proceedings on the original bill, and that they, as heirs-at-law of Louis Bell, had acquired a patent to said land from the United States, and praying for an injunction against the defendant's using or occupying any portion of said land, or from running or operating its said railroad upon said land, and that the defendant be decreed to have no right to condemn any part of said land under the laws of eminent domain of the State of Florida, and to enjoin the same, and for compensation to the complainants for the value of said land, and to remove said railroad from said lot, and for compensation for the use and occupation of said land by the defendant and for waste and damage alleged to have been committed on said lot by the defendant. On February 1, 1897, this defendant filed its answer to the said supplemental bill, setting up its defences thereto, and also alleging that it had not commenced proceedings in the circuit court of the sixth judicial circuit, Hillsborough county, State of Florida, for the purpose of condemning said prop-
313 erty under the laws of eminent domain of the State of Florida, and that the said equity cause involves the title to the same land and in all respects the same subject-matter and the same relief as this suit, and said equity cause is still pending and prosecuted by the complainants. Wherefore defendant says the plaintiffs ought not to maintain this suit against this defendant."

Thereupon the court made this order: "This cause coming on to be heard upon the motion of the defendant for leave to file additional pleas, * * * and it having been fully heard and considered,

and it appearing that none of said pleas constitute a good defense to said action that could not as well be shown under the general plea of not guilty, it is ordered that said motion to file additional pleas be denied." * * *

On March 5, 1897, the plaintiff in error presented its motion as follows: "Now comes the defendant in the above cause on this day and moves the court to dismiss said cause, for the reason that there is nothing upon the face of the declaration to show that this court has jurisdiction to hear and determine the said cause." On which the court made its order, to wit: "On consideration of this motion to dismiss, it is ordered in open court, March 11, 1897, that said motion be dismissed." Thereupon the parties filed in open court a written stipulation in these words: "Now come the above-named parties, plaintiffs and defendant, by their respective counsel, and hereby agree to waive a jury, and that the action may be tried by the court without a jury."

314 On March 23, 1897, the circuit court made its findings as follows:

"This cause coming on for a hearing by the court without a jury, a jury having been waived herein by a stipulation by the parties in writing, and having been fully heard by the introduction of documentary evidence and the testimony of witnesses, and being duly considered, the court finds as matters of law that the plaintiffs are entitled to the possession of and have a fee-simple title in and to the land hereinafter described, and the undivided interests of the plaintiffs in and to the said land are as follows, to wit: William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, and Matilda P. Feihe (*née* Bell) have and own each one undivided sixth part and interest in the said land, and that George A. Bell and Simon Bell have and own each one undivided twelfth part and interest in said lands.

"And the court further finds, as a matter of law, that the plaintiffs have at all times within seven years next before the commencement of this action been entitled to the exclusive possession of said tract or lot of land hereinafter described, and are entitled to such amount in the form of judgment for damages and mesne profits as will fully compensate them for any damages that have been sustained, and loss of rents and profits which have been caused by the unlawful trespass and possession of the defendant herein.

"And the court further finds, as a matter of fact, that in damages and in loss of rents and profits the plaintiffs have been injured and damaged to the extent of $1,955.

"And the court further finds, as a mixed matter of law and fact, for the plaintiffs, and that they should have judgment for the shares and portions as found in the first finding, to wit: William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, Matilda P. Feihe (*née* Bell), each one-sixth part, and George A. Bell and Simon Bell each one-twelfth part in fee-simple interest in and to the following-described lot or tract of land, to wit: A strip and parcel of land, being a part of lot 8, section 24, township 29 south, range 18 east, of the

315 meridian of Tallahassee, State of Florida, and county of Hillsborough, known and described as follows, to wit: Be-

ginning at a point in the east boundary line of said lot 8 at a distance of 75 feet in a south direction from the northeast corner of said lot, running southwesterly, parallel to the northwesterly boundary line of said lot, to the western boundary line of said lot 8, fourteen hundred and twenty-four feet; thence south on said western boundary line of 75 feet; thence northeasterly on a line parallel to said northwestern boundary line of said lot to the eastern boundary line of said lot; thence north along said eastern boundary line of 75 feet to the place of beginning. And the court further assesses their damages for injury, use, and occupation while said land has been held and occupied by said defendant company at $1,955, for which judgment should be given."

And on the same day entered judgment in favor of the plaintiffs below (defendants in error here) to the effect that they "receive and recover from the defendant, The Florida Central and Peninsular Railroad Company, the sum of nineteen hundred and fifty-four dollars, as well as — for costs in this behalf; and it is further considered that said plaintiffs have a fee-simple title in and to the lands and premises described as follows, to wit" (giving a description of the land):

The assignment of errors embraces twelve specifications. After a careful examination and consideration of the record and the briefs and oral arguments of counsel submitted, we deem it necessary to notice only the fourth ground of error suggested by
316 the plaintiff in error, that the court below refused to grant the defendant's motion to dismiss for want of jurisdiction. It is clear to us that this assignment of error is not well taken. The plaintiffs' whole suit in the circuit court rested upon the different statutes of the United States, giving their ancestor a right to preempt the land for which their action is brought. Moreover, their action was not for a recovery of the land alone, nor for the establishment of their title to it alone, but an important part of their action, if not the chief part, so far as it invoked litigation, was the recovery of damages for the occupation and use of the land for the years prior to the issuance of the patent. That part of the plaintiffs' action the defendant below did not admit; but, on the contrary, zealously denied and still stoutly contests, and makes that contest the foundation of four specifications of error embraced in its assignment.

There is no effort in this case to found the jurisdiction of the court on the diverse citizenship of the parties. There is nothing in the record to indicate that the judge of the circuit court entertained jurisdiction of the case on that ground. The declaration shows that in the pre-emption claim by the ancestor of the defendants in error to the land involved the claim was stoutly resisted by the plaintiff in error in the different stages of the prosecution thereof and before the different officers of the land department. It shows
317 that under a named act of Congress (approved May 17, 1856) the defendant claimed the right to occupy the land in question, in the manner that it was occupying it, without accountability to the defendants in error. It is difficult to perceive how the case

made in the circuit court by the defendants in error could be determined by that court without its construing the acts of Congress with reference to entries thereby authorized to be made on public lands conditioned as the land in question was at the time of Louis Bell's entry; and the fact that there had been a long-continued contest in reference thereto in the different offices and before the different officers of the land department would seem sufficient to show that there might be a construction of the public laws relating to that particular part of the public domain which would uphold the right of the heirs of Louis Bell and support their patent thereto, and also that there might be a construction of the laws of Congress relating thereto which would defeat, as the defendant had long attempted to defeat, the right of this pre-emptor and his heirs. So that, independently of the claim for mesne profits for the time transpiring between the pre-emption entry and the issuance of the patent, it is clear that the issues made by the declaration presented a case within the jurisdiction of the circuit court. Doolan *v.* Carr, 125 U. S., 618; Spokane Falls Railway *v.* Ziegler, 167 U. S., 65; Pierce *v.* Milliken, 78 Fed. Rep., 196. There is even less room to doubt that the circuit
318 court has jurisdiction of the case for the recovery of mesne profits accruing before the issuance of the patent. Evans *et al. v.* Durango Land & Coal Company *et al.*, 80 Fed. Rep., 433.

We think the court did not err in refusing the motion of the plaintiff in error for leave to file the additional pleas submitted. So far as these pleas were intended to affect the jurisdiction of the court they are clearly bad, because the jurisdiction of the court did not depend upon the defendant's answer and could not be taken away by it. Osborn *v.* Bank, 9 Wheat., 826.

As to the plea which sought to question the capacity of one of the plaintiffs to sue, it came too late, and if it had been presented in time it was clearly not good as pleaded. Dudgeon *v.* Watson, 23 Fed. Rep., 161.

As the record shows no error in the proceedings in the circuit court for which, in our opinion, the judgment of that court should be reversed, it is affirmed.

319 United States Circuit Court of Appeals, Fifth Circuit.

FLORIDA CENTRAL AND PENINSULAR RAILROAD CO., Plaintiff in Error, *vs.* WILLIAM J. BELL ET ALS., Defendants in Error. } No. 599.

To the Honorable Edward D. White, associate justice Supreme Court of United States:

The petition of the Florida Central & Peninsular Railroad Company with respect represents:

That there is error to its prejudice in the judgment rendered in this cause on the 24th day of May, 1898, by the United States circuit court of appeals, as will more fully appear by the assignment of errors hereto annexed; that this cause is one in which a writ of

error is allowed by the sixth section of the act of March 3rd, 1891, organizing the United States circuit courts of appeals to remove the cause to the Supreme Court of the United States, and the amount in dispute largely exceeds the sum of two thousand dollars, besides costs.

Premises considered, petitioner prays for a writ of error to remove said cause to the Supreme Court of the United States, returnable according to law, and that said writ of error may operate as a supersedeas upon the giving of a bond to be fixed and approved according to law, and for citation and for general relief.

JOHN A. HENDERSON,
J. C. COOPER,
W. W. HOWE,
Attorneys for Plaintiff in Error.

320 Writ of error allowed to operate as a supersedeas on plaintiff in error furnishing a bond, to be approved according to law, for $3,000.

E. D. WHITE,
Associate Justice.

June 2nd, 1898.

(Endorsed :) Filed June 6, 1898. J. M. McKee, clerk.

United States Circuit Court of Appeals, Fifth Circuit.

THE FLORIDA CENTRAL & PENINSULAR RAILROAD COMPANY, Plaintiff in Error,
vs.
WILLIAM J. BELL ET ALS., Defendants in Error.
} No. 599.

And now comes the plaintiff in error, by its attorneys, and assigns the following errors to its prejudice in the judgment rendered herein by this court May 24th, 1898:

First. The circuit court held and decided that, although William J. Bell and John W. Bell, of the plaintiffs, were citizens of the State of Texas; Frank A. Bell, E. A. Bell, Matilda P. Feihe, George A. Bell, and Simon L. Bell, of plaintiffs, were citizens of the State of Florida, and defendants a corporation organized and existing under the laws of the State of Florida, that said court had jurisdiction of said cause, and said court of appeals erroneously affirmed said ruling, and this decision and the ruling of said court of appeals is hereby assigned as error.

Second. The court below held and decided that, although the defendant admitted that before the commencement of the suit in ejectment that a patent was issued from the United States to
321 the plaintiffs for the land described in plaintiffs' declaration, and that defendant did not, at the time of the commencement of the suit, nor at the time of the filing of the pleas, claim and insist that plaintiffs derived no title to the said land, and although the defendant insisted that it did not claim any title to said land

under the laws of the United States of America or under any act of Congress or any law of the United States, but that it admitted absolutely the title of the plaintiffs under and by virtue of the patent issued, yet that said circuit court had jurisdiction of said cause, and said circuit court of appeals erroneously affirmed said ruling, and this decision and ruling of said court of appeals is hereby assigned as error.

Third. That the circuit court refused to permit the defendant to file the additional pleas numbered 2, 3, 4, and 5, and the said court of appeals erroneously affirmed said ruling, and this decision of said court of appeals is hereby assigned as error.

Fourth. The circuit court refused to grant defendant's motion to dismiss for want of jurisdiction, and the said court of appeals erroneously affirmed said ruling, and this decision and ruling of said court of appeals is hereby assigned as error.

Fifth. The circuit court refused to grant defendant's motion to continue said cause for the reason that the condemnation suit was pending, and the court of appeals erroneously affirmed said ruling, and this decision and ruling of said court of appeals is hereby assigned as error.

Sixth. During the trial of said cause in the circuit court the defendant there offered in evidence a certain chancery suit instituted in December, 1889, by plaintiffs against defendant, to enjoin the defendants from entering on the land described in plaintiffs' declaration, in which said chancery suit the fact was set forth fully that no one at said time had title to said land, and in which said chancery suit an order was made by the Honorable Don A. Pardee, as judge of the United States circuit court, permitting the de-
322 fendant to enter upon said lands and construct its tracks thereupon, conditioned that it should acquire title by condemnation whenever a patent was issued by the United States Government to plaintiffs, said proceedings being introduced for the purpose of showing the manner and good faith of the entering upon said land by defendant, and the circuit court did decline to permit the defendant to introduce said chancery record in said cause as evidence; which ruling the said court of appeals erroneously affirmed, and this ruling and decision of said court of appeals is hereby assigned as error.

Seventh. That the circuit court erred in finding and deciding as a matter of law that plaintiffs have at all times within seven years next before the commencement of this action been entitled to the exclusive possession of said tract or lot of land hereinafter described and entitled to such an amount, in the form of damages and mesne profits, as would fully compensate them for any damages that have been sustained and any loss of rents and profits which have been caused by the unlawful trespass and possession of the defendant below, and this ruling was erroneously affirmed by said court of appeals, and this ruling of the court of appeals is hereby assigned as error.

Eighth. That the circuit court erred in finding that plaintiffs

below were entitled to damages for any mesne profits prior to the date of the issuance of the United States patent to them, and this ruling was erroneously affirmed by said court of appeals; which ruling of said court of appeals is hereby assigned as error.

Ninth. That the circuit court erred in finding that the plaintiffs were entitled to damages and to mesne profits prior to the time that there was a final adjudication of the right and title of the litigants to this property by the Secretary of the Interior, and this ruling was erroneously affirmed by the said court of appeals; which said decision of said court of appeals is hereby assigned as error.

Tenth. That the circuit court erred in finding as a matter
323 of fact that in damages and in the loss of rents and profits the plaintiffs have been injured and damaged to the extent of one thousand and nine hundred and fifty-five dollars, and this ruling was erroneously affirmed by the said court of appeals; which decision of the said court of appeals is hereby assigned *assigned* as error.

Eleventh. The circuit court held and decided that, although there was no description by metes and bounds or otherwise in plaintiffs' declaration of the land in controversy, as required by the statute of the State of Florida, yet the court held and decided that the plaintiffs below were entitled to their respective shares, as set forth in the findings of the court, to the following-described lot or tract, to wit: A strip and parcel of land being a part of lot eight, section twenty-four, township twenty-nine south, range eighteen east, of the meridian of Tallahassee, State of Florida and county of Hillsborough, known and described as follows, to wit: Beginning at a point in the east boundary line of said lot eight at a distance of seventy-five feet in a south direction from the northeast corner of said lot, running southwesterly parallel to the northwesterly boundary line of said lot to the western boundary line of said lot eight (1,424) feet, fourteen hundred and twenty-four feet; thence south on said western boundary line 75 feet; thence northeasterly on a line paral-el*l* to the said northwestern boundary line of said lot to the eastern boundary of said lot; thence north along said eastern boundary line 75 feet to the place of beginning; and the said court of appeals erroneously affirmed said rulings, and this finding of law and fact by and action of the said court of appeals is hereby assigned as error.

Twelfth. That the circuit court erred in finding that there was any description in the declaration or any description of the land in controversy in evidence sufficient upon which to base a find-
324 ing of judgment contemplated by the statutes of Florida, and this ruling and finding were erroneously affirmed by said court of appeals, and this action of said court of appeals is assigned as error.

And for these and other errors apparent on the face of the record, plaintiff in error, defendant in the circuit court, prays that the judgment of said court of appeals rendered on May 24th, 1898, be

reversed, and that the judgment of the said circuit court be directed to be reversed, and for costs and general relief.

JOHN A. HENDERSON,
J. C. COOPER,
W. W. HOWE,
Attorneys for Plaintiffs in Error.

June 2nd, 1898.

Endorsed: Filed June 6th, 1898. J. M. McKee, clerk.

325 In the United States Circuit Court of Appeals, Fifth Circuit.

FLORIDA CENTRAL & PENINSULAR RAILROAD COMPANY, Plaintiff in Error,
v.
WILLIAM J. BELL, JOHN W. BELL, FRANK A. BELL, ELIZA A. Bell, Matilda P. Feihe and Her Husband, Antone Feihe, George A. Bell, and Simon Bell, Defendants in Error.

Know all men by these presents that we, E. A. Champlain and C. B. Rogers, are held and firmly bound unto William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, Matilda P. Feihe, Antone Feihe, George A. Bell, and Simon Bell in the sum of three thousand dollars, to be paid to the said William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, Matilda P. Feihe, Antone Feihe, George A. Bell, and Simon Bell, their heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 3rd day of June, A. D. 1898.

Whereas the said above-named plaintiff in error, The Florida Central & Peninsular Railroad Company, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause in the United
326 States circuit court of appeals for the fifth circuit:

Now, therefore, the condition of this obligation is such that if the above plaintiff in error, The Florida Central & Peninsular Railroad Company, shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, this obligation shall be void; otherwise to remain in full force and virtue.

E. A. CHAMPLAIN.
C. B. ROGERS.

Approved for supersedeas.

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

Endorsed: Filed June 10, 1898. J. M. McKee, clerk.

STATE OF FLORIDA, }
County of Duval. }

Before me personally appeared E. A. Champlain, who, being sworn in due form of law, deposes that he is worth the sum of three thousand dollars in visible unincumbered property, subject to execution, over and above his legal exemptions and liabilities.

E. A. CHAMPLAIN.

Sworn to and subscribed before me this 3rd day of June, A. D. 1898.

F. H. PATRICK, [SEAL.]
Notary Public, State of Florida at Large.

327 STATE OF FLORIDA, }
County of Duval. }

Before me personally appeared C. B. Rogers, who, being sworn in due form of law, deposes that he is worth the sum of three thousand dollars in visible unincumbered property, subject to execution, over and above his legal exemptions and liabilities.

C. B. ROGERS.

Sworn to and subscribed before me this 3rd day of June, A. D. 1898.

F. H. PATRICK, [SEAL.]
Notary Public, State of Florida at Large.

Endorsed: Filed June 10, 1898. J. M. McKee, clerk.

328 United States Circuit Court of Appeals, Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth judicial circuit, do hereby certify that the foregoing 328 pages, numbered from *a* to 327, inclusive, contain a true, full, and perfect transcript of the record and all proceedings had, including the opinion of the court, in the case of The Florida Central & Peninsular Railroad Company *vs.* Wm. J. Bell *et als.*, No. 599, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 11 day of June, A. D. 1898.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

329 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Florida Central and Peninsular Railroad Company, plaintiff in error, and William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, Matilda P. Feihe and her husband, Antone Feihe, George W. Bell, and Simon Bell, defendants in error, a manifest error has happened, to the great damage of the said The Florida Central and Peninsular Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., within 30 days from the date hereof, in the said Supreme Court of the United States, to be then and there held, *and* the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed to operate as a supersedeas, on furnishing bond conditioned according to law in the sum of three thousand ($3,000) dollars, by—

E. D. WHITE,
Associate Justice.

New Orleans, June 2d, 1898.

330 [Endorsed:] No. 599. Florida Central & Peninsular Railroad Company *vs.* W. J. Bell *et als.* Writ of error. Filed June 10, 1898. J. M. McKee, cl'k.

331 THE UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

The President of the United States to William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, Matilda P. Feihe and her husband, Antone Feihe; George A. Bell, and Simon Bell, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, D. C., within 30 days from the date hereof, pursuant to a writ of error sued out and filed in the clerk's office of the United States circuit court of appeals, fifth circuit, at New Orleans, La., in the cause wherein The Florida Central and Peninsular Railroad Company was plaintiff in error (defendant in the lower court) and you were defendants in error, being No. 599 of the docket of said United States circuit court of appeals, to show cause, if any there be, why the judgment rendered against the said The Florida Central & Peninsular Railroad Company, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this 2d day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

E. D. WHITE,
Associate Justice.

332 [Endorsed:] In U. S. Supreme Court. No. —. Florida Central and Peninsula- Railroad Company, plaintiff in error, *vs.* William J. Bell *et al.*, def'ts in error. Citation. Marshal's return.

I hereby accept service of the within citation for all of the within-named defendants in error.

H. BISBEE,
Counsel for Within-named Defendants in Error.

June 14th, 1898.

Endorsed on cover: Case No. 16,917. U. S. C. C. of appeals, 5th circuit. Term No., 332. The Florida Central & Peninsular Railroad Company, plaintiff in error, *vs.* William J. Bell, John W. Bell, Frank A. Bell, *et al.* Filed June 21st, 1898.

No.

Brief of Counsel

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19

No.

THE FLORIDA CENTRAL & PENINSULAR RAILROAD COMPANY,

Plaintiff in Error,

vs.

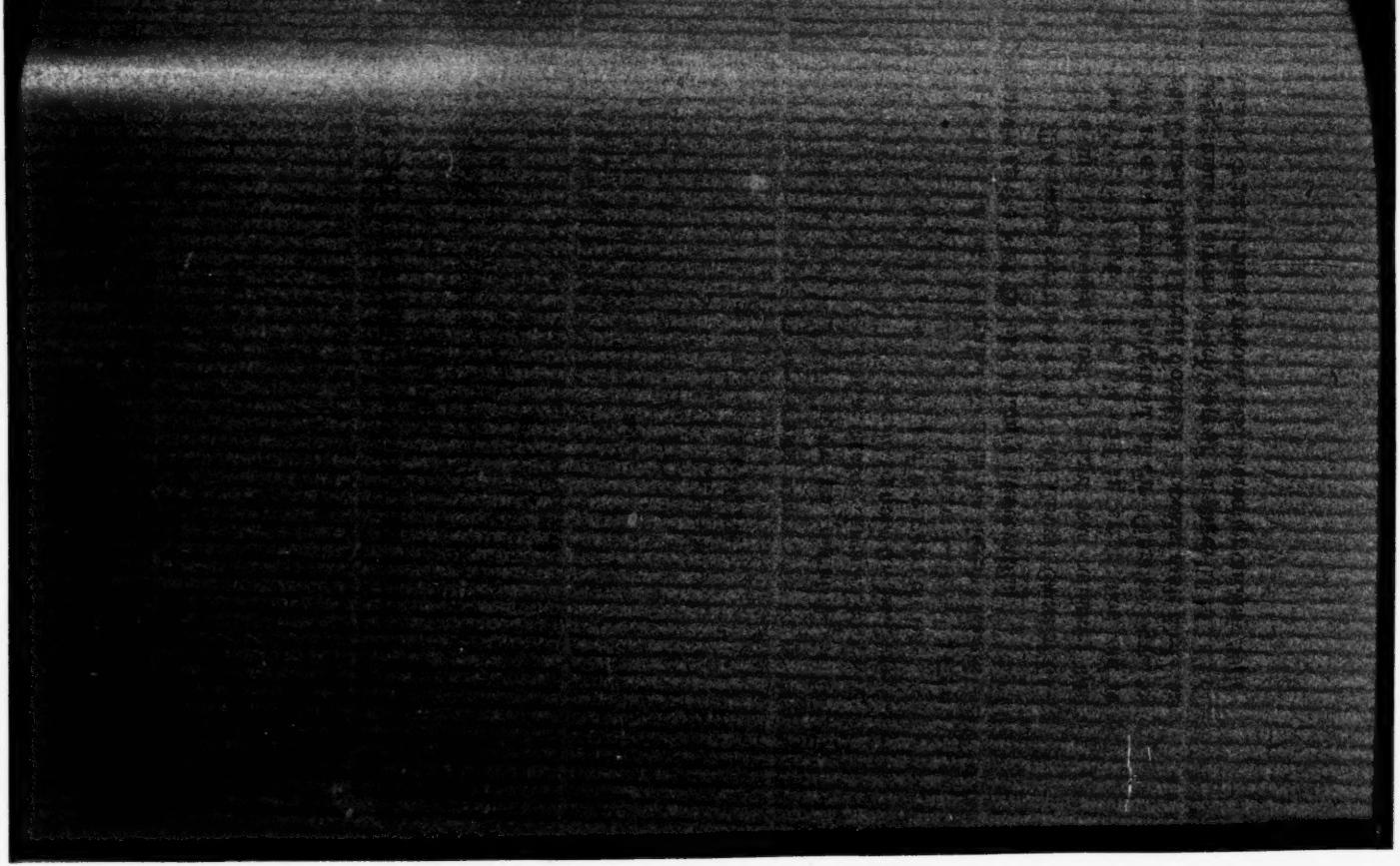
WILLIAM J. BELL, JOHN M. BELL, FRANK A. BELL, et al.,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR

On motion of Defendants in Error to dismiss writ of error and to affirm the judgment.

J. A. HENDERSON,
J. C. COOPER,
Attorneys for Plaintiff in Error.



IN THE SUPREME COURT OF THE UNITED STATES.

The Florida Central and Peninsular Railroad Company, Plaintiff in Error. vs. William J. Bell, et al., Defendants in Error.	No. 332.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS WRIT OF ERROR AND AFFIRM THE JUDGMENT.

Statement.

This was an action brought by the plaintiffs, William J. Bell, et al., in the United States Circuit Court for the Southern District of Florida to recover the possession of certain lands described as part of the right of way of the said Florida Central and Peninsular Railroad Company in Tampa, Florida, such lands being formerly known as the Fort Brooke Military Reservation.

The cause was tried by the said Circuit Court without a jury, by consent, and judgment was rendered for the plaintiff below. The plaintiff in error sued out a writ of error from the judgment of the Circuit Court to the United States Circuit Court of Appeals, and filed its assignment of errors, which appear on pages 16 to 18 inclusive of the printed record, and thereafter on May 29th,

1898, the judgment of the said Circuit Court was affirmed by the United States Circuit Court of Appeals. (See pages 174 to 181 inclusive.) From this judgment of the United States Circuit Court of Appeals, the plaintiff in error, The Florida Central and Peninsular Railroad Company has prosecuted its writ of error and filed its assignment of errors. (Pages 182 to 184, inclusive of the printed record.)

The plaintiffs below sought in their declaration to state a cause of action which they claimed arose under certain Acts of Congress, or which required a construction of the Acts of Congress

The plaintiffs alleged in their declaration (found on pages 3 and 4 of the Record) that they claimed title to the land under a patent from the United States upon a pre-emption claim, and that the defendant claimed that the plaintiff derived no title to the land under the laws of the United States, and claimed that under, and by virtue of, the first section of the Act of Congress entitled "An Act granting public lands in alternate sections to the States of Florida and Alabama to aid in the construction of railroads in said States," approved May 13, 1856, it was entitled to locate its route and locate its road over these lands, to-wit, what was a part of a United States military reservation known as Fort Brooke Military Reservation, at Tampa, Florida, and the plaintiffs also claimed the right to acquire the lands under an Act of Congress approved July 5th, 1885, entitled "An Act to provide for the disposal of abandoned and useless military reservations."

The defendant filed a plea of not guilty to the declaration, and subsequently offered to file four additional pleas (found on pages 7 to 9 inclusive of the printed record.)

The first of said pleas, numbered 2, denied that the Court had any jurisdiction, and denied the facts stated in the declaration which attempted to show that the suit involved questions requiring the construction of the laws of the United States. It denied that the defendant claimed title under any law of the United States. There was no denial by defendant below that it claimed any title or right of possession of the property, but only that it did not at the *time of commencement* of this suit and ever since claim title *under any law of the United States.*

The second of said pleas, numbered 3, alleged that one of the plaintiffs, Matilda P. Feihe, was an insane person, and could not maintain the said suit.

The third of said pleas, numbered 4, set up the manner in which the defendant had taken possession of said right of way, and set up that it had commenced and was then carrying on condemnation proceedings in the Circuit Court for the Sixth Judicial Circuit in and for the county of Hillsborough, State of Florida, to acquire title to said lands.

The fourth of said pleas, numbered 5, set up the pendency of a cause in equity brought by the plaintiffs, as complainants therein, on the 21st of January, 1890, against the defendant to enjoin defendent from constructing and operating its railroad across said lands, and that an order was issued thereon by the Circuit Judge allowing the defendant to proceed on giving a bond in the sum of five thousand dollars, conditioned that on filing said bond the injunction be dissolved, or on defendant's acquiring title under condemnation proceedings under the laws of Florida, that the injunction be dissolved; and that thereafter, on the 22d day of December, 1896, the same plaintiffs had filed a supplemental bill in the said

equity suit setting up said former proceedings, and that they had acquired patent from the United States and seeking to enjoin defendant from using or occupying the lands and for compensation for the value of the land, and for the use and occupation of the same, and that on February 1st, 1897, defendant had filed its answer to said supplemental bill, setting up its defenses, and setting up condemnation proceedings then pending in the Circuit Court for Hillsborough county, Florida, for the purpose of condemning said property under the laws of Florida.

The defendant made a motion to continue the trial of said cause, and on the affidavit stating the facts as to how the property was originally acquired and the use of the right of away by defendant for right of way and the pendency of proceedings to condemn said right of way. (See pages 10 to 12, inclusive, of printed record.)

The defendant also moved the said court to dismiss the said suit, on the ground that the Court had no jurisdiction, as shown upon the face of the declaration in said cause. (See page 12 of the record.)

All of said applications of defendant, to-wit, to file additional pleas, for a continuance, and for a dismissal of the cause were overruled by the Court below, to which exception was duly taken.

The chancery files in said suit of plaintiffs against defendant (found on page 113 to 133 of the printed record) were offered to be filed in evidence by the defendant below, but the Court refused to permit the filing of the same.

The condemnation proceedings in the State Court (found on page 133 to 156 of record) were offered and filed in evidence by the defendant. The Court on the evidence adduced, which is contained in the bill of ex-

ceptions, found for the plaintiff, and judgment was rendered thereon (See pages 14 to 16 of the printed record).

The bill of exceptions sets out the testimony in the case and the rulings thereon (pages 22 to 171 inclusive of the printed record).

A mere reading of the assignments of error will show that there are questions to be determined by the Court on the full hearing of the entire case, and which cannot be disposed of on motion to dismiss the writ of error or to affirm the judgment in advance.

Effect of motion practically an effort to make final hearing before setting of case.

This motion is an effort to have the whole cause heard and determined on a mere motion, in advance of the hearing on the merits. The Court will perceive at once, upon an examination of the motion and a reference to the assignments of error that it will be impossible for this Court to determine whether the assignments of error are predicated on exceptions properly taken or for delay, or whether or not the objection to jurisdiction is frivilous, without an examination of the whole record.

The Appellate Court will not entertain a motion to dismiss a writ of error, or to affirm a judgment as being taken for delay where it is apparent upon the reading of the motion that it requires an examination of the merits of the case and of the questions involved in the case in order to decide the motion.

Hill vs. Chicago & E. R. Co., 129 U. S., 170.

City of New Orleans vs. New Orleans & c., Co., 108 U. S. 15.

Bohanan vs. State, 108 U. S. 231.

Lynch vs. De Barnal 131 U. S., Appendix XCIV.

Grounds of Motion.

The grounds of the motion, in substance, are as follows:

1st. Writ of error does not lie in this case.

2nd. The United States Circuit Court for the Southern District of Florida had jurisdiction of the cause.

3rd. That no one of the assignments of error is well taken.

We insist that on this preliminary motion to dismiss writ, or to affirm the judgment before the regular hearing this Honorable Court will only consider the first ground of the motion, as to whether or not the writ of error would lie in this case. The other grounds of the motion, following, as they do, an examination of the record and of the merits of the case, could only be properly considered at the hearing.

A writ of error lies in this case to review the judgment of the United States Circuit Court of Appeals.

The sixth section of the Act of Congress of March 3, 1891, provides that the judgment and decree of the Circuit Court of Appeals shall be final in certain cases, naming them, and further provides for said Circuit Court of Appeals certifying questions to the Supreme Court of the United States for its determination, and also for the Su-

preme Court, by certiorari, or otherwise reviewing decrees of the Circuit Court of Appeals. The said section 6 also provides as follows: "In all cases not hereinbefore in this Act made final, there shall be the right of appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1000, besides costs."

This is a case that was originally brought in the United States Circuit Court for the Southern District of Florida, not on the ground of citizenship, but on the ground of the alleged existence of a Federal question. It was, therefore, a case not made final within the meaning of said section 6 of the act of March 3, 1891; that is the judgment of the United States Circut Court of Appeals is not made final, but is reviewable in the United States Supreme Court.

It has been determined by this Court a number of times that where a case arises under the laws of the United States and on that ground jurisdiction is assumed by the Court below, that writ of error will lie from the United States Supreme Court to the United States Circuit Court of Appeals to review a judgment of the latter court. This Court entertained an exactly similar writ of error to the U. S. Circuit Court of Appeals for the Eighth Circuit in Northern Pacific R. Co., vs. Smith, decided May 3rd 1898 U. S. Sup. Ct. Rep. Vol. 18, No. 29 page 794.

In a case involving the question of jurisdiction, with other questions, the defeated party may prosecute a writ of error to the United States Circuit Court of Appeals and there contest all of the questions in the case, or such party may prosecute a writ of error directly to the United States Supreme Court to review the question of jurisdic-

tion alone, and on such writ of error the U. S. Supreme Court will review all the questions involved.

Scott vs. Donald, 165 U. S., 73.

Chappell vs. U. S., 160 U. S., 499.

Carey vs. Houston, etc., Ry Co., 150 U. S., 181.

Horner vs. U. S., 143 U. S., 470.

But in the class of cases to which the one at bar belongs predicated upon the existence of Federal questions, and not upon citizenship, the said section 6 of the act of March 3d, 1891, gives the plaintiff in error as matter of right a writ of error from the Supreme Court of the United States to the United States Circuit Court of Appeals.

The attorney for the defendant in error, on this motion to dismiss the writ of error, does not cite any authority to sustain the proposition that because the defendant below took the whole case on the question of jurisdiction and the merits to the Circuit Court of Appeals, that thereby the judgment of the Circuit Court of Appeals became final, and there is no decision of this Court supporting that proposition in a case like the one at bar.

Northern Pacific R. R. Co. vs Amato, 144 U. S., 465.

Second Ground of Motion.

The second ground of the motion is in effect that the United States Circuit Court for the Southern District of Florida had jurisdiction of the cause. The plaintiff in error insists that the said court did not have jurisdiction of said case, and this question was raised at every stage of the proceedings by the plaintiff in error as defendant in the court below, to-wit, in its pleas and motion to dismiss.

These questions are covered by the first, second and fourth assignments of error.

"A"

These assignments of error involve the jurisdiction of the court below to try this cause—the question of jurisdiction is one of the questions involved in the case, being one of several questions, and is properly assigned as error in this court.

The declaration in this cause undertakes to make a cause of jurisdiction by alleging that the plaintiffs claim title under a patent of the United States, and that the Florida Central & Peninsular Railroad Company claimed title under an act of Congress approved May 17th, 1856, granting public lands in alternate sections in the States of Florida and Alabama, to aid in the construction of certain railroads in said States.

The pleas offered by the defendant show that the defendant did not claim title as alleged in the declaration. This divested the only ground of jurisdiction, to-wit, that both plaintiff and defendant claimed to take title under the laws of the United States. These questions should be determined on the final hearing. The defendants pleas deny the only ground of jurisdiction, and this defeats the jurisdiction.

Robinson vs. Anderson, 121 U. S., 522.

The fact that the plaintiffs claim title by virtue of a patent from the United States does not raise a Federal question and does not confer jurisdiction.

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Provident Svgs. Society vs. Ford, 114 U. S., 634, 642

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Theurkaf vs. Ireland, 27 Fed Rep., 769.

Murrary vs. Bluebird Mining Co., 45 Fed. Rep., 386.

See, also, 47 Fed. Rep., 340, and 49 Fed. Rep., 289.

Starin vs. N. Y., 115 U. S., 248-257.

But a statement by plaintiffs of defendant's claim of title does not make a case of Federal jurisdiction.

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Chappell vs. Waterworth, 155 U. S., 102.

East Lake Land Co. vs. Brown, 155 U. S., 488.

Oregon Short Line vs. Skottowe, 162 U. S., 490.

Fla. vs. Charlotte Harbor Phos. Co. (C. C. A., 5th Cir.) 74 Fed. Rep., 578.

Wabash R. R., vs. Barbour (C. C. A., 6th Cir.) 73 Fed. Rep., 513.

The defendants moved to dismiss the case for lack of jurisdiction upon the face of the declaration. (See page 20 of the Record) which motion was denied. The motion and the ruling thereon presents a question for the decision of this court without any exception separately reserved thereto, and if a special exception was necessary the same was properly taken, as will appear upon page 296 of the Record.

The Supreme Court of the United States held in Metcalf vs. Watertown, 128 U. S., 586, and in Col., Centl. Mining Co. vs. Turk, 150 U. S., 138, and cases there cited, that unless a question of the jurisdiction is made on the face of the declaration, it should be dismissed on motion. This question is duly raised by the motion in this cause.

Third Ground of Motion.

The third ground of the motion, to-wit: that no one of the assignments of error is well taken, would require an examination of each of said assignments, which we do not think this Court should be called upon to do, on a motion to dismiss or to affirm the judgment, but if the Court investigates the record to determine whether said judgment should be affirmed, we insist that the first, second and fourth assignments of error as to the jurisdiction stated above were correctly made and should have been sustained, and in addition we call the Court's attention briefly to certain other of the assignments of error, on which we insist that the ruling of the court below, and of the United States Circuit Court of Appeals was erroneous.

Third Assignment of Error.

The third assignment of error was to the refusal of the Court to entertain defendant's pleas 3, 4 and 5.

The third plea in effect stated that one of the plaintiffs, Matilda P. Feihe, was a person non compos mentis, insane, and not entitled to maintain the suit.

The statutes of Florida distinctly provide that suits by insane persons must be brought by their guardians. Section 982 Revised Statutes of the State of Florida, reads as follows: "INFANTS, LUNATICS, ETC. An infant may sue by his next friend in all cases whatsoever, and idiots and lunatics by their guardians."

It has been held in many cases that an insane person should sue by a committee or guardian.

Bird vs. Bird, 21 Grattan (Va.) 712.

Chicago &c. R. Co. vs. Munger, 78 Ill., 300.

Dearman vs. Dearman, 5 Ala., 202.

Warden vs. Fichbaum, 14 Pa. St., 121.

Hays vs. Miller, 81 Mo., 424.

Whetstone vs. Whetstone, 75 Ala., 495.

The pleas numbered 4 and 5, (page 8 of record), in effect state that the plaintiff in error, defendant below, constructed its road upon this property by leave of the United States Circuit Court, under an order dated January 2, 1890, in a chancery suit brought by the same parties as complainants who were plaintiffs in the suit above, against the defendant railroad company, which order of the Circuit Court authorized the giving of bond by the defendant company, and also provided that the injunction granted in the case be dissolved on the defendant company acquiring title to condemnation proceedings.

Plea number 4 set up the condemnation proceedings, and plea numbered 5 showed that the defendant railroad company went on the land and in possession of it under such circumstances as not to be a trespasser, and brought the case within the rule that ejectment would not lie against this defendant railroad company to oust it of the possession of the property, but that plaintiffs' cause of action was a suit for the value of the land taken.

This Court has determined that wherever possession of a right of way is acquired by a railroad company and its track constructed upon the land under circumstances which render it inequitable for the owner of the land to maintain ejectment, that said owner could not maintain an action of ejectment, but must sue for the value of the land.

See Roberts vs. No. Pac. R. R. Co., 158 U. S., 1.

No. Pac. R. R. Co. vs. Smith, decided May 31, 1898.

Supreme Court Rep. Vol. 1 18, No. 29, page 794.

This last case, in its facts, is very similar to the case at bar. The defendant railroad company in the case at bar before the Land Department of the United States claimed a right of way over this land, but this claim was denied by the United States Land Department and a patent issued to the plaintiffs below. In 1890, at the time the defendant railroad company constructed its road across the land in question, the United States Land Department had not yet determined whether the plaintiffs below were entitled to a patent, or whether the defendant railroad company had a right of way over the land. The defendant, under these circumstances and pending the chancery suit above mentioned with the defendant railroad company, built and constructed its road across the land in question, after giving the bond required by the United States Circuit Court for the Southern District of Florida to protect the plaintiffs' rights. It is, therefore, a case in which judgment in ejectment should not be permitted to stand.

Fifth Assignment of Error.

The fifth assignment of error was a motion for continuance of the case, on the ground that the Florida Central and Peninsular Railroad Company was engaged in pursuing condemnation proceedings in the State Court, to acquire title to the land, and had built its road on the land in good faith, and that the said Florida Central and Peninsular Railroad Company went into possession on order of his Honor Don A. Pardee, on giv-

ing a bond of $5,000 subject to condemnation proceedings.

We submit that this presented sufficient ground for a continuance of the cause, so that no judgment should be entered pending such condemnation proceedings.

It has been held in Florida that judgment in ejectment would be suspended pending condemnation proceedings.

See Patterson, etc., R. R. vs. Kamlah, 42 N. J. Eq. 93, 28 A. & E. R. R. Cas. 250.

Lewis Em. Dom,, sec. 634.

Pittsburg R. R. vs. Bruce, 102 Pa. St. 23, 10. A. & E. R. R. Cas. 1.

Conger vs. R. R., 41 Iowa, 419.

The Florida Central & Peninsular Railroad Company went into possession of this property in good faith and built upon the property long before any patent issued to plaintiffs and was duly seeking to condemn the land. This presents a question which should be examined in the cause. It is true that on the 5th of March, 1897, the amended petition for condemnation was dismissed by the State Court, but it was without prejudice to the filing of a new petition by petitioner and an affidavit for continuance. Motion for continuance was made on February 18th, 1897, and denied on that date, pending condemnation proceedings. (See page 10 of the record.) So that the record did in fact show that the company was proceeding to condemn and was entitled to file amended condemnation proceedings under the order of the State Court and that a cause of condemnation was pending.

Sixth Assignment of Error.

The sixth assignment of error was the refusal of the Court below at the trial to permit the introduction of any evidence of the chancery record in the case pending between the same parties, bill filed in December, 1889, which record showed that the defendant Florida Central & Peninsular Railroad Company entered into possession of said land at the time under the order in the chancery suit, that upon giving of a bond for $5,000, the injunction would be dissolved, granted in the said suit. The defendant was entitled to introduce this record to show the pendency of an equity suit involving the same subject matter and to show how the defendant came into possession of the property. These are questions to be argued on the final hearing, but exception was duly taken to the action of the Court refusing permission to file this record ; as shown by the bill of exceptions see page 113 of the record.

The Court undoubtedly should have permitted the introduction of this chancery record in evidence, to show the facts under which the defendant railroad company went into possession of the property. These facts amounted to an adjudication under the order of the United States Circuit Court of Appeals, and acquiesence therein by the plaintiffs below, that on the giving of the bond of $5,000, and the bringing of condemnation proceedings that the defendant railroad company might build its railway across the land in question.

Under the decisions of this Court ejectment will not lie to oust a railroad company in possession of part of its right of way on which a railroad is constructed and being operated, because the public as well as the parties have an interest in the continued operating of such railroad.

Roberts vs. No. Pac. R. R. Co., 158 U. S. 1.

No. Pac. R. R. Co. vs. Smith, decided May 31, 1898, Supreme Ct. Rep. Vol. 18, No. 29, page 794.

Seventh Assignment of Error.

The seventh assignment of error goes to the very merits of the title as between the plaintiff and defendant.

The court below refuses to dismiss for want of jurisdiction or to entertain defendant's plea that it did not claim under a law of the United States.

The plaintiff put in evidence the claim of title of both plaintiff and defendant made before the Interior Department, found on pages 23 to 50 of the record. Before the Interior Department the plaintiff claimed the right to pre-empt the land, although it had been part of a military reservation, and defendant before the Interior Department claimed a right of way across the land under an act of Congress.

If the court below entertained jurisdiction of this case and were justified in so doing, the plaintiff in error here has a right to have it determined in the appellate court whether or not the action of the Interior Department as a matter of law was correct in holding and determining that defendant was not entitled to a right of way accross this land under act of Congress of 1856. In other words, the question of plaintiffs' and defendants' title, the defendant has a right to have determined in this court, and to review the finding of the court below on this subject.

Eighth and Ninth Assignments of Error.

The court below found as a matter of fact that the plaintiffs were entitled to recover mesne profits and damages from the defendant Florida Central and Peninsular Railroad Company prior to the issue of any patent by the United States to plaintiffs.

This is a question raised by the assignment of errors and appearing on the face of the findings made by the court below and cannot be disposed of on mere motion to dismiss the writ of error.

Tenth Assignment of Error.

The tenth assignment is as to the finding of the amount of rents and profits in favor of the plaintiff on the evidence as shown by the bill of exceptions. This requires an examination of the record in the cause, but should not be disposed of on this motion.

Eleventh and Twelfth Assignments of Error.

The eleventh and twelfth assignments of error are in effect that the court found a judgment in favor of plaintiff to recover an entirely different piece of land from that described in the declaration and further that the court could not make any finding or judgment for recovery on the description in the declaration, the same was too vague and indefinite upon which to base any judgment or finding. A comparison of the land described in the judgment of the court with the declaration will show that the court attempted to work out its own de-

scription of a different piece of land from that described in the declaration. An examination of the land described in the declaration will show no sufficient metes or bounds or measurements are given to describe the land sued for. No judgment or right of possession thereon could properly be executed on the land described in said declaration.

In Florida the judgment in an action of ejectment must describe exactly the property recovered and must find a right of possession in the plaintiff of that particular land and must state the quantity of the estate of the plaintiff in the particular piece of land described in the verdict and judgment.

Horne vs. Carters, Admr. 20, Fla. 51.

Ashmead vs. Wilson 22, Fla. 255.

Sedgwick & Wait on trial of title, etc.

Sec. 457, 458, 459, 463.

Section 1515 of the Revised Statutes of the State of Florida is as follows: "A verdict for the plaintiff shall state the quantity of the estate of the plaintiff and describe the land *by its metes and bounds*, by the number of the lot or other certain description." The judgment awarding possession shall in like manner state the quantity of the estate, and give a description of the land recovered."

In order to carry out and enforce this statute the declaration must state a sufficient description and the finding must follow the land described in the declaration.

See Asa vs. Hiser, 27 Fla. 378.

Patrick vs. Young, 18 Fla., 50.

Lungren vs. Brownlie, 20 Fla., 491.

Neal vs. Spooner, 20 Fla., 38.

Slacum vs. Pomery, 6 Cranch, 221.

The motion to dismiss the writ of error in this case certainly ought not to be granted where it appears that there are questions to be decided and determined by this court in the hearing of the cause and the motion to affirm is equally objectionable.

It does not appear that this writ of error was taken for delay and the objections as to jurisdiction are not frivilous. From the matters above set forth, it will appear that there are several important questions to be determined by this court on this writ of error. It is not necessary to repeat what is said above.

This motion to affirm is only an effort to have the cause heard and disposed of on motion, which motion requires an argument of the whole case and an investigation of the whole case. Such investigation will not be made before the cause is set down for hearing in its regular order.

The questions raised on the propriety of the action of the court below in disallowing the additional defences offered by defendant under pleas 2, 3, 4 and 5, in refusing to dismiss the cause for want of jurisdiction in awarding the damages and judgment it did award, and in refusing of permit the filing of the chancery record as evidence in the cause, are all properly before this court on this writ of error and do not show a writ of error taken for delay, or the raising of frivilous matter.

We submit that this court will not dismiss a writ of error where there appears to be any question raised by

the assignment of errors worthy of consideration by the court. A mere reading of the assignment of errors, page 16 of the record, will show that there are such questions here raised.

J. A. Henderson
J. C. Cooper
Attorneys for Plaintiff in Error.

In the Brief of Cooper for

Filed April 5, 1879

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1878.

No. 137.

THE FLORIDA CENTRAL & PENINSULAR RAILROAD COMPANY,

Plaintiff in Error,

vs.

WILLIAM J. BELL, JOHN T. BELL, FRANK A. BELL, et al.,

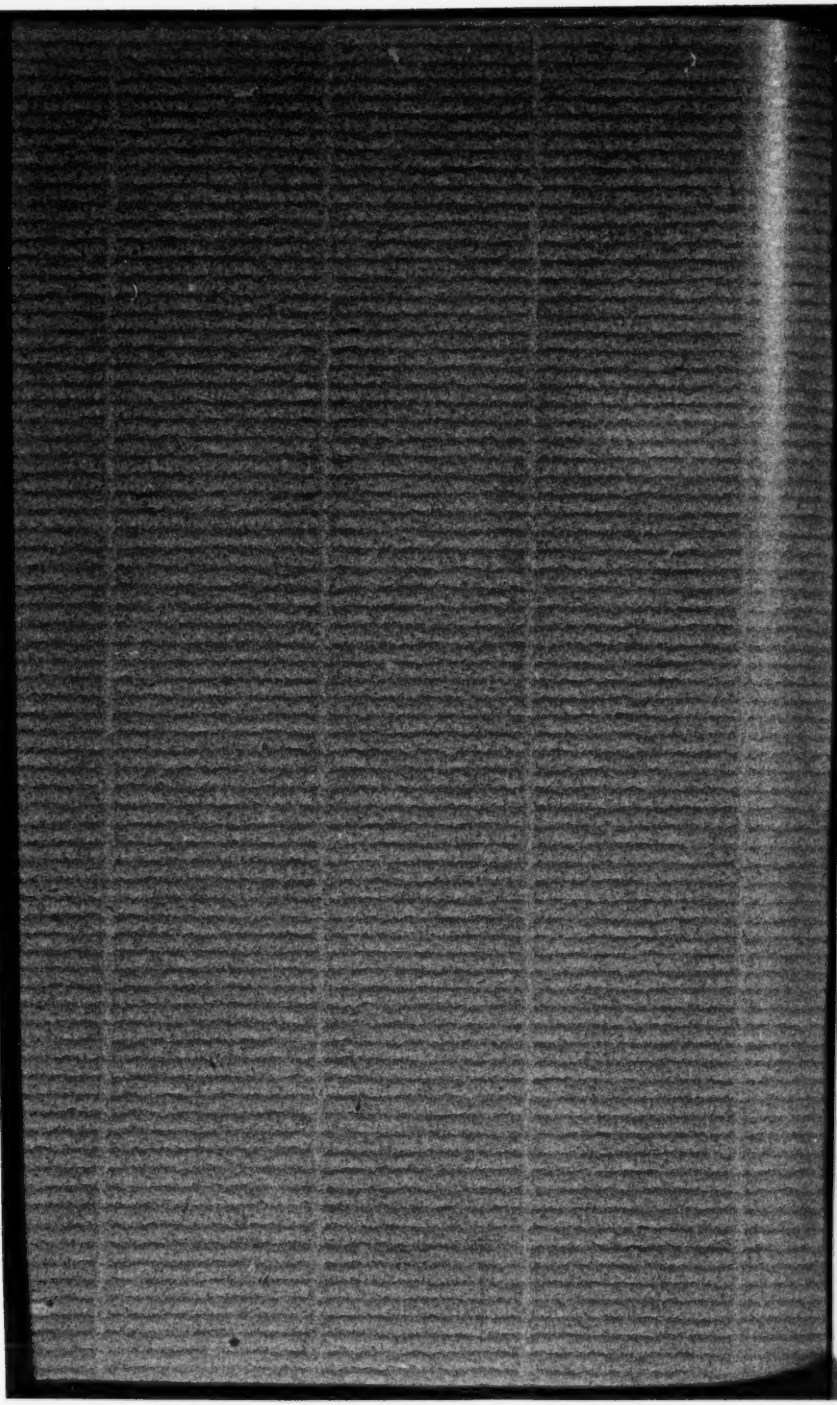
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

J. A. HENDERSON,

J. C. COOPER,

Attorneys for Plaintiff in Error.



IN THE SUPREME COURT OF THE UNITED STATES.

The Florida Central and Peninsular Railroad Company, Plaintiff in Error.	
vs.	No. 332.
William J. Bell, et al., Defendants in Error.	

BRIEF OF PLAINTIFF IN ERROR.

Statement.

This was an action brought by the plaintiffs, William J. Bell, et al., in the United States Circuit Court for the Southern District of Florida to recover the possession of certain lands described as part of the right of way of the said Florida Central and Peninsular Railroad Company in Tampa, Florida, such lands being formerly known as part of the Fort Brooke Military Reservation.

The cause was tried by the said Circuit Court without a jury, by consent, and judgment was rendered for the plaintiffs below. The plaintiff in error sued out a writ of error from the judgment of the Circuit Court to the United States Circuit Court of Appeals, and filed its assignment of errors, which appear on pages 16 to 18 inclusive of the printed record, and thereafter on May 29th, 1898, the judgment of the said Circuit Court was affirmed by the United States Circuit Court of Appeals. (See pages 174 to 181 inclusive.) From this judgment of the United States Circuit Court of Appeals, the plaintiff in

error, The Florida Central and Peninsular Railroad Company has prosecuted its writ of error and filed its assignment of errors. (Pages 182 to 184, inclusive, of the printed record.)

The plaintiffs below sought in their declaration to state a cause of action which they claimed arose under certain Acts of Congress, or which required a construction of Acts of Congress.

The plaintiffs alleged in their declaration (found on pages 3 and 4 of the record) that they claimed title to the land under a patent from the United States upon a pre-emption claim, and that the defendant claimed that the plaintiffs derived no title to the land under the laws of the United States, and claimed that under, and by virtue of, the first section of the Act of Congress entitled "An Act granting public lands in alternate sections to the States of Florida and Alabama to aid in the construction of railroads in said States," approved May 13, 1856, it was entitled to locate its route and locate its road over these lands, to-wit, what was a part of a United States military reservation known as Fort Brooke Military Reservation, at Tampa, Florida, and the plaintiffs also claimed the right to acquire the lands under an Act of Congress approved July 5th, 1885, entitled "An Act to provide for the disposal of abandoned and useless military reservations."

The defendant filed a plea of not guilty to the declaration, and subsequently offered to file four additional pleas (found on pages 7 to 9 inclusive, of the printed record.

The first of said pleas, numbered 2, denied that the Court had any jurisdiction, and denied the facts stated in the declaration which attempted to show that the suit involved questions requiring the construction of the laws of the United States. It denied that the defendant

claimed title under any law of the United States. There was no denial by defendant below that it claimed any title or right of possession of the property, but only that it did not at the *time of commencement* of this suit and ever since claim title *under any law of the United States.*

The second of said pleas, numbered 3, alleged that one of the plaintiffs, Matilda P. Feihe, was an insane person, and could not maintain the said suit.

The third of said pleas, numbered 4, set up the manner in which the defendant had taken possession of said right of way, and set up that it had commenced and was then carrying on condemnation proceedings in the Circuit Court for the Sixth Judicial Circuit in and for the county of Hillsborough, State of Florida, to acquire title to said lands.

The fourth of said pleas, numbered 5, set up the pendency of a cause in equity brought by the plaintiffs, as complainants therein, on the 21st of January, 1890, against the defendant to enjoin defendant from constructing and operating its railroad across said lands, and that an order was issued thereon by the Circuit Judge allowing the defendant to proceed on giving a bond in the sum of five thousand dollars, conditioned that on filing said bond the injunction be dissolved, or on defendant's acquiring title under condemnation proceedings under the laws of Florida, that the injunction be dissolved; and that thereafter, on the 22d day of December, 1896, the same plaintiffs had filed a supplemental bill in the said equity suit setting up said former proceedings, and that they had acquired patent from the United States and seeking to enjoin defendant from using or occupying the lands and for compensation for the value of the land, and for the use and occupation of the same, and that on February 1st, 1897, defendant had filed its answer to said

supplemental bill, setting up its defenses, and setting up condemnation proceedings then pending in the Circuit Court for Hillsborough county, Florida, for the purpose of condemning said property under the laws of Florida.

The defendant made a motion to continue the trial of said cause, and on the affidavit stating the facts as to how the property was originally acquired and the use of the right of way by defendant for right of way and the pendency of proceedings to condemn said right of way. See pages 10 to 12, inclusive, of printed record.)

The defendant also moved the said Court to dismiss the said suit, on the ground that the Court had no jurisdiction, as shown upon the face of the declaration in said cause. (See page 12 of the record.)

All of said applications of defendant, to wit, to file additional pleas, for a continuance, and for a dismissal of the cause were overruled by the Court below, to which exception was duly taken.

The chancery files in said suit of plaintiffs' against defendant (found on pages 113 to 133 of the printed record) were offered to be filed in evidence by the defendant below, but the Court refused to permit the filing of the same.

The condemnation proceedings in the State Court (found on pages 133 to 156 of the record) were offered and filed in evidence by the defendant. The Court on the evidence adduced, which is contained in the bill of exceptions, found for the plaintiffs, and judgment was rendered thereon (See pages 14 to 16 of the printed record.)

The bill of exceptions sets out the testimony in the case and the rulings thereon (pages 22 to 171 inclusive of the printed record.)

The property for which said suit is brought, and the taking of the possession of same by plaintiff in error, are referred to and described in the declaration of defendants in error, as plaintiffs in the Court below, as follows: "Because the defendant, heretofore to-wit, in the year A. D., one thousand, eight hundred and ninety, took possession of, as its railroad bed and right of way, and built its railroad of four tracks across and through and upon a strip and parcel of land, being a part of lot eight, section twenty-four, township twenty-nine, south of range eighteen, east according to the surveys, maps and plats thereof made by the Government of the United States, and under and according to the laws of the said United States, which said lot eight is in Hillsborough County, State of Florida, and in the said Southern district of Florida, which said strip and parcel of land so taken as aforesaid by the defendant, and which the said defendant is in possession of and was in possession of at the time of the commencement of this suit, contains about seven acres, etc." See page 3 of printed record.

The Court made its findings of law and fact, and rendered a judgment in favor of plaintiffs and against defendant, to-wit, that plaintiffs recover from the defendant the sum of nineteen hundred and fifty-four dollars, and also the following as to the lands mentioned in said judgment, "It is further considered that the said plaintiffs have a fee simple title in and to the lands and premises described, as follows, to-wit: A strip and parcel of land lying and being a part of lot eight (8), section twenty-four (24), township twenty-nine (29), south of range eighteen (18) east of the meridian of Tallahassee, in the County of Hillsborough, State of Florida, beginning at a point in the east boundary line of said lot eight (8), at a distance of seventy-five (75)

feet, in a south direction from the northeast corner of said lot, and running southeasterly parallel to the northwesterly boundary line of said lot to the western boundary line of said lot eight (8), fourteen hundred and twenty-four (1424) feet, thence south on said western boundary line seventy-five (75) feet, thence northeasterly, on a line parallel to the said northwestern boundary line of said lot to the eastern boundary of said lot; thence north along said eastern bonndary line seventy-five (75) feet to the place of beginning." See pages 14 to 16 of the record. From this judgment, the defendant below sued out its writ of error to the Circuit Court of Appeals, and from the judgment of said Circuit Court of Appeals to this Court.

ARGUMENT.

The Court below had no jurisdiction.

These questions are covered by the first, second and fourth assignments of error.

These assignments of error involve the jurisdiction of the court below to try this cause—the question of jurisdiction is one of the questions involved in the case, being one of several questions, and is properly assigned as error in this court.

The declaration in this cause undertakes to make a cause of jurisdiction by alleging that the plaintiffs claim title under a patent of the United States, and that the Florida Central & Peninsular Railroad Company claimed title under an act of Congress approved May 17, 1856, granting public lands in alternate sections in the States of

Florida and Alabama, to aid in the construction of certain railroads in said States.

The pleas offered by the defendant show that the defendant did not claim title as alleged in the declaration. This divested the only ground of jurisdiction, to-wit, that both plaintiff and defendant claimed to take title under the laws of the Unted States. The defendants' pleas deny the only ground of jurisdiction, and this defeats the jurisdiction.

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The fact that the plaintiffs claim title by virtue of a patent from the United States does not raise a Federal question and does not confer jurisdiction.

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The defendant moved to dismiss the case for lack of jurisdiction upon the face of the declaration. (See page 20 of the Record) which motion was denied. The motion and the ruling thereon presents a question for the decision of this court without any exception separately reserved thereto, and if a special exception was necessary the same was properly taken, as will appear upon page 170 of the Record.

The Supreme Court of the United States held in Metcalf vs. Watertown, 128 U. S., 586, and in Col., Centl. Mining Co. vs. Turk, 150 U. S., 138, and cases there cited, that unless a question of jurisdiction is made on the face of the declaration, it should be dismissed on motion. This question is duly raised by the motion in this cause.

The first, second and fourth assignments of error, and the portion of the third assignment of error covering the refusal of the Court for leave to file the second additional plea found on pages 7 to 8 of the record, may be considered together. These assignments of error present two questions for the determination of this Court.

1st. The Court below had no jurisdiction of the case as stated upon the face of the declaration.

2nd. The additional plea number two above mentioned of the defendants, denied that defendants claimed title under any law of the United States, and therefore the Court below had no jurisdiction of this cause.

The defendants below moved the Court to dismiss this cause for want of jurisdiction before the trial of the case. See page 12 of the printed record. Which motion

is also inclu led in the bill of exceptions, page 170 of the printed record.

Unless the declaration distinctly showed a case of jurisdiction in the Court at the time this suit was brought, the Court below should have granted this motion to dismiss the case for lack of jurisdiction. The declaration found on pages 3 to 5 inclusive of the record, shows that the only ground of jurisdiction attempted to be stated was that the plaintiff claimed title under and by virtue of a patent from the United States. The declaration further alleges that the defendant claimed, insisted and contended in the General Land Office and before the Secretary of Interior, that plaintiffs were not entitled to have a patent, and that at the time of the commencement of this suit claimed and insisted that plaintiff had no title to said land under said patent, and at said time claimed that under an act of Congress entitled "An Act granting public lands in alternate sections to the States of Florida and Alabama to aid in the construction of railroads in said States, approved May 17th, 1856," it was entitled and had a right to locate the route of its railroad, and construct the same, through the said lands and to be in possession thereof, said section eight being a part of the Fort Brooke Military Reservation at Tampa, State of Florida. The declaration further alleges that the plaintiffs contended for and claimed a patent to said land under an Act of Congress entitled "An Act to provide for the disposition of abandoned and useless military reservations," approved July 5th, 1885, and that defendant in the General Land Office, and in office of the Secretary of Interior claimed and contended, and at the commencement of this suit claimed and contended that plaintiffs were not entitled to a patent to said land under said Act of Congress, and at said times claimed and insisted

that it was entitled to locate its route of its railroad over said parcel of land and to be in possession thereof under and by force of the third proviso of the said Act of Congress approved May 17th, 1856.

These allegations of the declaration do not state a case necessarily involving *the construction* of any act of Congress. The allegations do not declare that plaintiff claimed title under their patent, or obtained it by reason of one *construction* of the law of the United States, and defendants claimed by reason of *another construction* of any law of the United States that said patent did not pass title.

These allegations do not state a case showing that by reason of any construction of the Act of Congress of May 17th, 1856, referred to, defendants had title to said lands, or right of possession thereof. The declaration shows on its face that plaintiffs claimed title to said land under and by virtue of a patent granted by the Government of the United States of America to the said Lewis Bell and his heirs. The question as to whether the plaintiffs derived title to said land under and by virtue of the patent as against the defendant would not in itself be a Federal question. All titles are derived mediately or immediately from the Government, and therefore, the fact that plaintiff claims title under a patent from the Government, which title is resisted by the defendant, does not present a Federal question.

The allegation of the declaration, that at the time of the commencement of the suit defendant claimed, that under said act, approved May 17, 1856, it was entitled to, and had a right to locate the route of its railroad and construct the same through the said lands and to be in possession thereof, on the ground that the said tract of land was a part of a military reservation, does not

necessarily present a Federal question. Under this declaration the plaintiffs might attempt to show, as they did in the Interior Department, that the defendant had not, *in fact*, complied with the terms of the act of May 17th, 1856, and had not, *in fact*, built its road on said reservation, in pursuance of said act, but had located its original route of definite location on a different route from the one now built upon, across this portion of said reservation. Whether or not this were true, would not present a Federal question. This declaration, to state a case authorizing a Federal court to try the case, should state that, in fact, the said defendant went upon the land under said act, and, in fact, did those things required by the act, but that the correct construction of the act gave defendants no right to go upon this land.

It is entirely consistent with this declaration, that the Court would not be called upon to construe the act itself at all, but that plaintiff should simply prove that the defendant had not complied with the act. So, in reference to the act of July 5th, 1885, referred to in the declaration. It is alleged in the declaration that the defendant contended before the Interior Department, and at the time of the commencement of this suit, that plaintiffs were not entitled to a patent under the act, but, it is not alleged that defendant contended that they were not entitled to such patent by reason of any construction of the law, and such contention might as well have been based on the ground that they had not complied with the law. The patent having issued, as stated in the declaration, no allegation in the declaration that the defendant contended that said patent should not have been issued states a case of Federal jurisdiction, unless it is distinctly stated that such claim and contention *is based on matter of law or construction of Federal statutes*, and these allegations

should be in a form that excludes all other constructions that may be put upon the declaration. Under this declaration, the Federal Court could try simply the right of possession of defendants by reason of their, in fact, having complied with the act of May 17th, 1856, and obtained possession under said act, or not, and these would all be matters of fact, requiring no construction of the acts of Congress.

The declaration, in order to state Federal questions, so as to give the Court jurisdiction, should state *in terms* what the *question* is, or was, under the acts of Congress named, and the *construction* of same which would be required to be determined by the Court in deciding whether the plaintiff or defendant had title to the lands. It is not enough to simply state that plaintiff claims title under a patent, and that defendant denies that plaintiff had a right to a patent, and that defendant claims and insists that it has a right to be in possession under some act of Congress. The declaration must go further, and show what *questions*, whether of *construction*, or otherwise, arise on the acts of Congress under which the parties claim title. This case could be, and was, under this declaration an ordinary contention of who had the title or right of possession to the land, and therefore was not a case of Federal jurisdiction. The right claimed by the plaintiff, or by the defendant, as stated in the declaration, do not necessarily involve the construction of the laws of the United States.

The declaration must show the plaintiffs claim of title, requires a construction of an Act of Congress.

The declaration shows that *plaintiff's* claim title under a patent from the United States already granted. The construction of the rights conferred by the United States land patent does not raise a Federal question. It is simply a case of an ordinary right of property sought to be enforced. It must appear, in order to create a Federal question, that *plaintiff's* title, on which recovery depends will be defeated by one construction of the constitution or laws of the United States, or sustained by the opposite construction. The declaration presents no such questions or questions on the record, of construction of the constitution or any law of the United States upon which the *plaintiff's* claim of title depends.

In order to sustain the jurisdiction by reason of the existence of a Federal question, it should appear on the face of this declaration that the rights of the *plaintiff necessarily* hang on the construction of the law of the United States.

The allegations in the declaration in regard to claims or contentions of the defendant to locate the route of its railroad through the said land and to be in possession thereof, under an Act of Congress do not raise a Federal question so as to confer jurisdiction on this Court.

By the case of Tennessee, etc., vs. Union and Planters Bank, 152 U. S., 454, it is settled that a United States Court has no original jurisdiction of a suit as one arising under the laws of treaties of the United States, *unless it appears distinctly by the plaintiff's statement of his own claim.*

In this case the Court adopts the views of Mr. Justice Miller in his dissenting opinion in R. R. vs. Miss., 102 U. S., 135, whe he takes the position that a defense based on Federal laws would not support Federal juris-

diction. In this case of Tennessee vs. Bank, 152 U. S,. 454, the Court says, at page 464, that it is well settled law, " That a suggestion of one party that the other will or may set up a claim under the constitution or laws of the United States, does not make the suit one arising under the constitution or those laws. And this is approved in the following cases:

Chappell vs. Waterworth, 155 U. S., 102;

East Lake Land Co. vs. Brown, 155 U. S., 488;

Oregon Short Line vs. Skottowe, 163 U. S., 490;

Fla. vs. Char. Har. Phos. Co. (C. C. A., 5th Cir.), 74 Fed. Rep., 578;

Wabash R. R. vs. Barbour (C. C. A., 6th Cir.), 73 Fed. Rep., 513.

In Metcalf v. Watertown, 128 U. S., 586, 589, it was held: " Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not appear, then the Court upon demurrer or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the State Court a suit which the record at the time of removal, failed to show was within the jurisdiction of the Circuit Court. It cannot retain it in order to see whether the *defendant* may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of

the suit, is not cured by an answer or plea which may suggest a question of that kind."

This case is approved in Col. Central Mining Co. vs. Turck, 150 U. S., 138;

See also Central Railroad vs. Mills, 113 U. S., 249, 257. Montana Ore Co. v. B. & M. C. C. & S. Min. Co., 93 Fed. Rep. 274

The fact that the *defendant is* alleged in the declaration to claim rights under an act of Congress, would not avail the plaintiff, then, in order to make the case cognizable in a Federal Court, no matter how distinctly the Federal question involved on *defendant's* contention was pleaded.

No Federal question distinctly stated.

In Hanford vs. Davies, 163 U. S., 273, it is held that where jurisdiction is claimed on the ground that there is a Federal question involved, it is not sufficient that jurisdiction will be inferred argumentatively under averments in the pleadings, but the averments should be positive Where all that appears from the record is that if certain conditions of fact are made to appear in evidence, as in this case, that the defendants complied with the act of May 17th, 1856, and in fact went into possession under it, then a Federal question may arise on the construction of the act in case jurisdiction is made. The exact question of construction must be stated.

Iowa vs. Railway, 33 Fed. Rep., 391;

Manhattan Ry. vs. Mayor of N. Y., 18 Fed. Rep., 195.

For the reasons stated above, the declaration does not state a case of jurisdiction. It plainly alleges *plaintiff's* only claim of title is by authority of the patent, and

shows no construction of any Act of Congress necessary to establish *ptaintiff's* claim. The allegation as to *defendant's* claim of title under an Act of Congress can give no jurisdiction. The allegations are too indefinite and uncertain as to what Federal question or what question of construction, if any, of any law of the United States must necessarily arise in the case, and therefore the declaration states no case of jurisdiction.

Defendant's plea denied any claim under the laws of the United States.

The defendant's plea, number 2 (see pages 3, 4 and 168 of the Record), is a distinct denial that defendant claims title to the lot under any act of Congress or denies plaintiff's title by reason of construction of any act of Congress.

If the Court should find that the declaration has averred the existence of a Federal question in such terms as to presumptively state a case of jurisdiction, that jurisdiction fails upon the filing of defendant's plea admitting the rights claimed by plaintiff under the laws of the United States and denying that the defendant claims any rights under the laws of the United States in land in question. There cannot be a suit arising *under the laws* of the United States, unless the plaintiff claims, and the defendant denies the right of plaintiff existing by virtue of the laws of the United States. If defendant admits all that plaintiff claims under the United States laws and declares no intention of itself relying on those laws, there is no question arising under the laws of the United States for the Court to adjudicate, and this precise point has

been so decided by the Supreme Court of the United States in the case of:

Robinson vs. Anderson, 121 U. S., 522. In this case Chief Justice Waite, says, "Even if the complaint standing by itself, made out of jurisdiction, which we do not decide it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what *the defences* against the title of the plaintiffs would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defences were relied on."

To the same point, see S. P. Ry. vs. Whittaker, 47 Fed. Rep., 529.

Stayton Mining Co. vs. Woody, 50 Fed. Rep. 633.

Section 5 of the Judiciary Act 1875 provides that the Court shall dismiss the suit at any time when it appears that the Court has no jurisdiction. If it appears from the *evidence even*, admissible under the pleading, pertinent to the issues, that the Court has no jurisdiction, the Court should dismiss the suit.

Hartzog vs. Memory, 116 U. S., 588, 591.

Considering together the cases above cited, particularly Tennessee vs. Bank, 152 U. S., 454, and Robinson vs. Anderson, 121 U. S., 522. The following is the law as decided by the Federal Courts upon the matter of jurisdiction, based on the existence of a Federal question.

1. In order to confer any jurisdiction on a United States Court, in all suits arising under the laws of the United States, the declaration must distinctly and positively show on its face that the *plaintiff* claims rights, the existence of which *necessarily* hangs on the *construction* of the Constitution, or some law of the United States.

2nd. If the jurisdiction, thus prima facie, appears by the plaintiff's pleadings, it falls if the defendant in his answer or plea admits the rights claimed by the plaintiff under the Constitution or laws of the United States, or if at any stage of the case it appears that the issues do not necessarily involve the construction of such constitution or laws.

The Court erred in refusing to permit the filing of additional plea, number 2,

The Court clearly erred in not permitting the defendant to plead to the jurisdiction, as stated in the said plea. This plea denies the existence of any of the claims or contentions which could by any possibility create Federal questions in this case. The plea states that the defendant admits that patent was issued by the United States to plaintiffs, and admits that plaintiffs claimed title to said land described in the declaration as heirs of Louis Bell under said patent, and the defendant says it is not true that the defendant, at the time of the commencement of this suit, claimed and insisted that the plaintiff derived title to said land under and by virtue of said patent, and that it is not true that at said time, or at any time since, that defendant claimed under the laws of the United States or act of Congress referred to, (referring to Acts,) or any other act of Congress, or law of the United States, any right or title in the land. Defendant also admits that now and at the time of the commencement of the suit it had no title under any act of Congress or laws of the United States, and asks that the suit be dismissed. Whether the Court admitted this plea to be filed technically as a plea, it was certainly good as an affidavit sworn to, in support of a motion to dismiss for want of jurisdic-

tion, and the Court immediately on the tendering of this paper to be filed, sworn to, should have dismissed this case, because there was nothing further to litigate before the Court—the only questions the Court then could possibly have entertained would be the mere questions of title or no title and of damages, to consider which it had no jurisdiction in the case made.

The Court in its order (page 9 of the record) refusing to permit the filing of the pleas decided, "It appearing that none of said pleas constitute a good defense to said action that could not as well be shown under the general plea of "Not Guilty," it is ordered that said motion to file the additional pleas be denied." This ruling does not meet the question of jurisdiction raised by the plea. Whether the facts of what sources of title the parties claimed under could be investigated under a plea of not guilty, and whether or not the existence of Federal questions could be investigated under the plea of "Not Guilty," was no ground for refusing to file the plea, which on its face, without the taking of evidence, destroyed every possible Federal question in the case, or the possibility of such a question arising because the defendant in and by the plea denied that it disputed the plaintiff's title under the patent and denied that it claimed title or right of possession under any act of Congress. If this plea had been filed, no Federal question could arise in the case, and the Court should have filed the plea and dismissed the suit.

The Court below also erred in holding that a plea to the jurisdiction should not be filed where a plea of not guilty has been filed in the case, for under the Judiciary act of 1875 the defendant may at any time file a plea raising the question of jurisdiction. The plea of "Not Guilty" puts in issue the title and right of possession, but does

not necessarily raise the question of jurisdiction. Anterior to the act of 1875 this question must be raised by plea before pleading to the merits, but since the act of 1875, it may be pleaded at any time, and may be pleaded along with the pleas to the merits.

Under the statutes of Florida the plea was admissible. The Revised Statutes of Florida, section 1064, clearly entitled the defendant not only to plead the general traverse, but in addition thereto to deny any material allegation of the declaration. A defendant is not obliged to risk his whole case upon whether or not the general issue covers his defense. He may plead the general issue, and at the same time deny any material averment of the declaration.

Sections 1,063 and 1,064 of the Revised Statutes of the State of Florda read as follows:

"Section 1,063. The defendant may plead as many matters of fact as he may deem necessary to his defense."

"Section 1,064. A defendant may either traverse generally such of the facts contained in the declaration as might have been denied by one plea, or may select and traverse separately any material allegation in the declaration, although it *may have been included in a general traverse.*" This plainly means that although a general traverse has been already filed, the defendant may answer separately any material allegation in the declaration.

The Court therefore erred in refusing the motion to dismiss for want of jurisdiction on the face of the declaration and in denying the motion to file plea numbered two, and erred in not dismissing the case in itself on the reading of plea numbered two, when it was tendered to be filed, and in this case should be reversed on these grounds.

No Jurisdiction on Account of Citizenship.

It may be urged by the defendant in error in this case, that although the summons and declaration did not state the citizenship of but two of the parties plaintiff, that this failure to state a case in the declaration, of jurisdiction on account of citizenship as to the rest is immaterial, and that the Court had jurisdiction on the ground of citizenship of the two. The præcipe for summons, (page 1 of the record) and the summons state that William J. Bell and John W. Bell are citizens of the State of Texas, and do not state the citizenship of the other plaintiffs. None of the pleadings state a case of citizenship as to the other plaintiffs. The Court in its findings (page 15) finds in favor of each of the plaintiffs, by name, and that they *each* have an undivided one-sixth part, except George A. Bell and Simon Bell, who each have an undivided one-twelfth part, and the judgment (page 16 of the record) *is jointly in favor of all* of the plaintiffs.

This was a *joint suit* brought in the name *of all* the plaintiffs to recover jointly. They do not seek to recover undivided interests, and therefore, where only two are shown to have the citizenship necessary to give jurisdiction, and the recovery must be by all of the plaintiffs jointly of the entire property, this suit should have been dismissed entirely, for want of jurisdiction, because all, except two, of the plaintiffs are not shown to have the requisite citizenship to maintain the suit. Even if the Court should hold that two of the plaintiffs, William Bell and John W. Bell, who are alleged to be citizens of Texas, can recover in this action their respective undivided interests, it is clear that the motion to dismiss for want of jurisdiction should certainly have been granted as to all of the other plaintiffs, except William J. Bell

and John W. Bell. If said William J. Bell and John W. Bell have any right of recovery at all in this suit, which we deny, they could only recover repectively their undivided one-sixth interest, and the rest of the plaintiffs had no right whatever to sue in this court, but the court gave judgment in favor of all of the plaintiffs jointly, including said William J. Bell and John W. Bell, together with the other plaintiffs also, and that they *jointly* should recover the entire tract, as shown by the judgment.

The finding of the Court (pages 14 to 16 inclusive of the record) found the several undivided interests of the respective plaintiffs in the said land, but the judgment (page 16 of the record) adjudges in favor of the plaintiffs jointly for the entire premises.

Where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in the courts of the United States.

Strawbridge vs. Curtiss, 3 Cranch, 267;

Followed, as applied to Act of 1887 by Smith vs. Lyon, 133 U. S., 315,318.

Also followed :

N. O. vs. Winter, 1 Wheat, 91;

Coal Co. vs. Blatchford, 11 Wall, 172, 174;

Sewing Mach. Cos., 18 Wall, 553 ;

Peninsular Iron Co. vs. Stone, 121 U. S., 631.

"In other words, if there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue, and if there are several co-defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained."

Coal Co. vs. Blatchford, 11 Wall, 172, (Per Field):

See Karns vs A. & O. Ry., 10 Fed. Rep., 309.

If a plaintiff is a citizen of the same state as defendant, fatal to jurisdiction either original or by removal, unless claimed under separable controversy clause.

Peper vs. Fordyce, 119 U. S., 469.

In removal cases, held that to make a separable controversy, there must be a separate and distinct cause of action which can be fully determined without the presence of other parties to the suit, as it has been begun.

Fraser vs. Jennison, 106 U. S., 191, 194;

Ayres vs. Wiswall, 112 U. S., 192.

Where interests of parties are so mixed up and identified that they must and should be decided together, no separable controversy exists.

Wilson vs. Ry., 22 Fed. Rep., 3, per Miller, Jus.

Even where resident defendant defaulted and no controversy left as to him, non-resident cannot remove.

Brooks vs. Clark, 119 U. S., 512.

In the case of removals not under the separable controversy clause, the jurisdiction is defeated, if any necessary plaintiff is a citizen of the same State as any necessary defendant.

Removal cases, 100 U. S., 469.

The two plaintiffs who are citizens of Texas cannot recover more than their own undivided interests.

Stevens vs. Ruggles, 23 Fed., cases, 13, 408;

Newell on Ejectment, 83;

Hicks vs. Rogers, 4 Cranch, 166;

Mattox vs. Boggs, 28 N. W., 325;

62 N. Y., 475.

In common law tenant in common may maintain ejectment.

Tyler on Ejectment, 56.

Ejectment will lie by A. against B. for an undivided one-half interest, and statutory form of declaration is sufficient.

Gale vs. Hines, 17 Fla., 773.

Ejectment will lie by tenant in common against co-tenants after ouster.

Kearnes vs. Hill, 21 Fla., 185.

1 Chitty Pl. says that parceners must join, but tenants in common serve in real actions.

6 A. & E. Encyc. L. 206, 244, says that tenants in common should join, but seems to refer to statutes.

"One joint tenant ought not to recover the whole land and when the subject of a suit is entire, a part thereof cannot be recovered."

Webster vs. Vandementer, 6 Gray, 428, 431.

Tenants in common cannot sue in real actions jointly, but must bring separate actions.

11. A. & E. Encyc. L. 1137.

The Court had no jurisdiction whatever of this case on the part of the plaintiffs, other than William J. Bell and John W. Bell based on the ground of citizenship, and therefore the judgment in favor of the other plaintiffs and entertaining the case of the other plaintiffs was error for lack of jurisdiction in the Court, and the said joint judgment in favor of all the plaintiffs, was void for want of jurisdiction.

Third Assignment of Error.

The third assignment of error was to the refusal of the Court to entertain defendant's pleas, 3, 4 and 5.

Plaintiff Matilda P. Feihe Insane.

The third additional plea was that Matilda P. Feihe was insane and the suit could not be maintained in her name individually. The third additional plea, to file which leave was prayed (see pages 12 and 293 of the Record), set forth that one of the plaintiffs, Matilda P. Feihe, was a person *non compos mentis*, and that she could not maintain this suit, or the suit could not be maintained in her name. An insane person cannot make a contract, and cannot bind themselves to pay the costs, and are not bound by any judgment against them. This is well settled at the common law.

In this case one of the plaintiffs, as set up in the plea, was an insane person. The plea was a proper defense as to any attempted recovery in her name, and it should have been admitted by the Court. If the defendant had succeeded in this action, it would have been no bar to an action brought hereafter by the said Matilda P. Feihe, if she recovered her reason, or to any action brought by any guardian or committee hereafter appointed by the Court to take charge and sue for her estate. If the defendant should recover judgment against this plaintiff for costs, it should not be enforced or collected and such judgment would be no bar to future suits, and therefore this suit should have been dismissed as to her. A recovery in the name of an insane person is a nullity. It would be in the highest degree unjust to permit a suit to be maintained in the name of a person

against whom no judgment would be effective. An insane person must sue by a committee or guardian.

Bird vs. Bird, 21 Grattan, (Va.) 712.

Chicago &c. R. Co. vs. Munger, 78 Ill. 300.

Dearman vs. Dearman, 5 Ala., 202.

Warden vs. Fichbaum, 14 Pa. St., 121.

Hays vs. Miller, 81 Mo., 424.

Whetstone vs Whetstone, 75 Ala, 495.

The laws of the State of Florida require suits by lunatics to be brought by the guardian. Section 982 reads as follows:

"INFANTS, LUNATICS, ETC.—An infant may sue by his next friend in all cases whatsoever, and idiots and lunatics by their guardians."

The Court, therefore, erred in refusing to permit the third plea to be filed, or to entertain the same, as defense, and it having been suggested to the Court by this plea that this plaintiff was insane, the Court erred in rendering a judgment in her favor in this cause.

Chancery Suit and Condemnation Proceedings.

The pleas numbered 4 and 5, (page 8 of record), in effect state that the plaintiff in error, defendant below, constructed its road upon this property by leave of the United States Circuit Court, under an order dated January 2, 1890, in a chancery suit brought by the same parties as complainants who were plaintiffs in the suit above, against the defendant railroad company, which order of the Circuit Court authorized the giving of bond by the defendant company, and also provided that the injunction

granted in the case be dissolved on the defendant company acquiring title to condemnation proceedings.

Plea number 4 set up the condemnation proceedings, and plea numbered 5 showed that the defendant railroad company went on the land and in possession of it under such circumstances as not to be a trespasser, and brought the case within the rule that ejectment would not lie against this defendant railroad company to oust it of the possession of the property, but that plaintiff's cause of action was a suit for the value of the land taken.

This Court has determined that wherever possession of a right of way is acquired by a railroad company and its track constructed upon the land under circumstances which render it inequitable for the owner of the land to maintain ejectment, but must sue for the value of the land.

See Roberts vs. No. Pac. R. R. Co., 158 U. S., 1.
No. Pa. R. R. Co. vs. Smith, decided May 31, 1898.
Supreme Court Rep. Vol. 1 18, No. 29, page 794.

This last case, in its facts, is very similar to the case at bar. The defendant railroad company in the case at bar before the Land Department of the United States claimed a right of way over this land, but this claim was denied by the United States Land Department and a patent issued to the plaintiff below. In 1890, at the time the defendant railroad company constructed its road across the land in question, the United States Land Department had not yet determined whether the plaintiffs below were entitled to a patent, or whether the defendant railroad company had a right of way over the land. The defendant, under these circumstances and pending the chancery suit above mentioned with the defendant railroad company, built and constructed its road across the land in question, after giving the bond required by the United

States Circuit Court for the Southern District of Florida to protect the plaintiffs' rights. It is, therefore a case in which judgment in ejectment should not be permitted to stand.

The Fourth Plea—Condemnation Proceedings.

The fourth plea set up that the defendant located its road on this land in December 1889, and January 1890; that it laid its tracks there and has continuously ever since maintained and operated the railroad thereon, that on the 21st of December, 1896, it filed its proceedings for partition in the Circuit Court for the Sixth Judicial Circuit in and for the County of Hillsborough, for the purpose of having condemned the said land under its right of Eminent Domain, and condemnation under the laws of the State of Florida: that at the time of offering to file the plea that those proceedings were pending and undisposed of, and that in and by said proceedings the defendant would acquire any title claimed by the plaintiff, and that compensation would be awarded in said proceedings to plaintiffs and paid to plaintiffs, for any claim of title, or right to said property.

The Court on February 18th, 1897, refused to permit the filing of this plea, or to entertain this as a plea in the action. It was competent for the Court to have permitted the filing of the plea and to have suspended the hearing of this case until the condemnation proceedings were finally disposed of. It has been held in Florida that a judgment in *ejectment* will be suspended pending condemnation proceedings.

And this has also been decided in other States to be a good defense to an action to recover the property.

J. T. & K. W. Ry. Co. vs. Adams 28, Fla., 637.

See Patterson, etc. R. R. Co. vs. Kamlah, 42 N. J., Eq., (28 Am. & Eng. R. R. Cases, 250).

Lewis Em. Dom., Sec. 534.

Pittsburg R. R. vs. Bruce, 102 Pa. St. Repts., 23, (10 A. & E. R. R. Cases 1).

Conger vs. R. R. Co., 41 Ia. 419.

Fifth Assignment of Error.

The fifth assignment of error was a motion for continuance of the case, on the ground that the Florida Central and Peninsular Railroad Company was engaged in pursuing condemnation proceedings in the State Court, to require title to the land, and had built its road on the land in good faith, and that the said Florida Central and Peninsular Railroad Company went into possesion on order of his Honor Don A. Pardee, on giving a bond of $5,000 subject to condemnation proceedings.

We submit that this presented sufficient ground for a continuance of the cause, so that no judgment should be entered pending such condemnation proceedings.

It has been held in Florida that judgment in ejectment would be suspended pending condemnation proceedings.

See Patterson, etc., R. R. vs. Kamlah, 42 N. J. Eq. 93, 28 A. & E. R. R. Cas. 250.

Lewis Em. Dom., 634.

Pittsburg R. R. vs. Bruce, 102 Pa. St. 23, 10, A. & E. R. R. Cas. 1.

Conger vs. R. R., 41, Iowa 419.

The Florida Central & peninsular Railroad Company went into possession of this property in good faith and built upon the property long before any patent issued to plaintiffs and was duly seeking to condemn the land. This presents a question which should be examined in the cause. It is true that on the 5th of March, 1897 the amended petition for condemnation was dismissed by the State Court, but it was without prejudice to the filing of new petition by petitioner and an affidavit for continuance. Motion for continuance was made on February 18th, 1897, and denied on that date, pending condemnation proceedings. (See page 10 of the record.) So that the record did in fact show that the company was proceeding to condemn and was entitled to file amended condemnation proceedings under the order of the State Court and that a cause of condemnation was pending.

In this connection the third assignment of error may be considered. This was the error of the Court below in refusing to grant its motion for continuance (Found on pages 10, 11 and 12.) This motion was supported by affidavit of Peter O. Knight showing how the defendant entered upon this land, and that at the time it laid its tracks upon the land numerous persons were attempting to make entries in the United States land office of the property, and otherwise acquire title to it, and it was impossible for the defendant then to acquire title by condemnation. That these same plaintiffs sought by a bill for injunction on the 21st of January, 1890, to restrain the defendant from laying and constructing its tracks on said land, and that his Honor D. A. Pardee, issued an order providing that if the defendant should give bond in the sum of $5,000.00, conditioned that whenever the plaintiffs obtained title from the United States Govern-

ment to said land, that then and in that event defendants should in good faith institute condemnation proceedings against plaintiff for the purpose of acquiring title to said land, also that defendant did give said bond and has constructed its depots and tracks on said land, and that the lands are necessary to the operating of its said road in Tampa, Florida, and that the defendant has instituted condemnation proceedings against the plaintiff for the purpose of acquiring title to the land that its tracks are located on, and that it would be a great loss to the defendant and injury to the public interests to compel it to remove its tracks from this lot.

This motion came on to be heard on February 18th, 1897, and was denied. (See page 12 of the printed record.)

Under the authorities cited above, the defendant was entitled, on giving property security at least to have this suit continued until it had full opportunity in the State Courts to litigate its right to condemn this property, but the Court denied both the filing of the plea and the motion for a continuance, in effect holding that the condemnation proceedings, or bona fide effort to condem, and the fact that defendant had built its tracks under an order permitting same in a Chancery cause wherein the plaintiffs were complainants, did not entitle defendants to any continuance or to any suspension of the trial of said action. It is true the condemnation proceedings were afterwards, on trial, put in evidence (found on pages 133 to 156 inclusive), and that the order was made in said condemnation proceedings, after the motion for contiuance had been overruled, to-wit, on the 5th of March, 1897, dismissing the amended petition for condemnation, but without prejudice to the filing of a new petition by the petitioner, the railroad company, the defendant in this cause.

A motion for a continuance in this cause was made on February, 18th, 1897, and denied that on that date pending condemnation proceedings, so that at the time the order was made denying the right to file the plea, and at the time the order was made refusing to continue the case until the termination of the condemnation proceedings, the record showed that the company was endeavoring to condemn the land, and even if the petition for condemnation then on file was afterwards dismissed on the ground of the technical objections to the form of the same set up in the answer to said proceedings, the order of the Court permitted the defendant to file another petition for condemnation proceedings and the cause of condemnation was still pending in the State Court, subject to amendments, and not finally disposed of, and before the amended petition could be filed, the Court below in this case went into the trial of same and gave judgment in favor of the plaintiffs. The refusal of the Court below to continue this case, or to entertain the plea setting up the condemnation proceedings, in any event excuses the defendant from continuing condemnation proceedings until it should be determined by this Appellate Court, that the pendency of the condemnation proceedings in the State Court entitled the defendant to an order either abating or continuing the ejectment suit in the Federal Court, as the defendant in this cause was forced to prosecute this writ of error, and to assign as error the refusal of the Court below, before any termination of the condemnation proceedings, to suspend the ejectment suit pending condemnation proceedings.

It will be noted in the answer of these plaintiffs as defendants to the condemnation proceedings in the 4th paragraph of said answer, they set up the pendency of the bill in equity brought by the plaintiffs in this suit in the Federal Court on its equity side and alleged

the pendency of that suit, in bar of the condemnation proceedings. (See page 145 of the Record). This was the equity suit in which Judge Pardee made his original order permitting the defendant Railroad Company to occupy the land on giving bond, and it may be that the State Court intended to determine that the condemnation and acquiring of title to the property should be had in that equity suit. If so, the Court below also erred in refusing to permit the filing of the defendant's fifth additional plea (pages 7 and 8 of the Record), in this ejectment suit, which plea sets up the pendency of this identical suit in equity and that all of the questions should be determined in that equity suit.

This 5th plea recites the history fully of the defendants going upon this land, that the plaintiffs sought to enjoin them, and the order of Judge Pardee, of January, 1890, providing for the defendant giving bond and acquiring title under condemnation proceedings, that they were permitted to go upon the land, and on the 22d of December, 1896, after plaintiffs perfected their patent they filed a supplemental bill in the same original equity suit praying an injunction and compensation for the value of the land, and that defendants, had answered that supplemental bill and the pendency of the equity cause, and also that it had commenced condemnation proceedings in the State Court, to-wit, the Circuit Court of the Sixth Judicial Circuit of Hillsborough County, Florida, for the purpose of condemning this property under the laws Eminent Domain of the State of Florida. The Court below held and determined that the plea should not be filed. This plea ought to have been filed at least to compel the election by plaintiffs of their remedy and dismissal of either the equity suit or the law suit, and it should also have been filed so that the defendant might dimin-

ish any alleged damages, by showing that they went upon this land in good faith under the provisions of an order of the United States Curciut Court for the Southern District of Florida in a cause brought by the plaintiffs themselves, and the Court below therefore erred in refusing to permit the filing of said plea.

Sixth Assignment of Error. The refusal of the Court to admit in evidence the record of the chancery suit.

The sixth assignment of error was the rufusal of the Court below at the trial to permit the introduction of any evidence of the chancery record in the case pending between the same parties, bill filed in December, 1889, which record showed that the defendant Florida Central and Peninsular Railroad Company entered into possession of said land at the time under the order in the Chancery suit, that upon giving of a bond for $5,000, the injunction would be dissolved, granted in the said suit. The defendant was entitled to introduce this record to show the pendency of an equity suit involving the same subject matter and to show how the defendant came into possession of the property. Exception was duly taken to the action of the Court refusing permission to file this record: as shown by the bill of exceptions, see page 113 of the record.

The Court undoubtedly should have permitted the introduction of this Chancery record in evidence, to show the facts under which the defendant railroad company went into possession of the property. These facts amounted to an adjudication under the order of the United States Circuit Court and acquiesence there in by the plantiff's below, that on the giving of the

bond of $5,000, and the bringing of condemnation proceedings that the defendant railroad company might build its railway across the land in question.

Under the decisions of this Court ejectment will not lie to oust a railroad company in possession of part of its right of way on which a railroad is constructed and being operated, because the public as well as the parties have an interest in the continued operating of such railroad.

Roberts vs. No. Pac. R. R. Co., 158 U. S., 1;

No. Pac. R. R. Co. vs. Smith, decided May 31, 1898;

Sup. Ct. Rep., Vol. 18, No. 29, page 794.

The Court should have permitted this record to be introduced in evidence. It went also to the measure of damages against the defendant for entering upon the land.

It showed that the defendant entered under a claim of right and in good faith, intending to condemn the property whenever the plaintiffs, or anybody else acquired the title so that defendant could condemn.

Good faith affects the measure of damages, Lawrence vs. Rector, 137 U. S., 139;

New Orleans vs. Gaines, Admr., 131, U. S., 191;

Worthington vs. Neiss, 70 Md., 172, 16 Atlantic Rep., 534.

This Chancery suit, (found on pages 113 to 131 of the record) and the proceedings in the office of the Secretary of the Interior (found on pages 29 to 50 inclusive of the record) shows that a great number of persons beside plaintiffs claimed a right to acquire this land from the United States Government, that it was a part of a former Military Reservation known as Ft. Brooke Military Reservation at Tampa, Florida, and that in December, 1889, at the time defendant needed to go across the land, the

title still was in the United States and numbers of claimants thereto, and under these circumstances, Judge Pardee made his order above mentioned. The affidavits filed in that case showed the absolute necessity of defendants crossing this lot with its tracks to reach the Hillsborough River at Tampa, Florida.

Under these circumstances, the plea of pendency of this Chancery suit, and the introduction in evidence of the record in the Chancery suit was relevant. The defendant was seeking at the time this evidence was offered to condemn this property in accordance with the order of Judge Pardee in the Chancery suit, and the evidence was material as to the nature of defendant's possession and the measure of damages.

Lawrence vs. Rector, 137 U. S., 139;
New Orleans vs. Gaines Admr., 131, U. S., 191.

It is held in Florida that if the defendant railroad company actually lays its tracks upon the land, but without the owner's permission, it will not be thereafter enjoined from operating its railroad upon the land; and therefore it should certainly not be ousted from the possesion of the land where it is already operating its railroad and is willing to condemn the premises and pay a fair valuation for the property. See Moody vs. J. T. & K. W. R. Co., 20 Fla., p. 616.

Seventh Assignment of Error. Plaintiff's right of possession.

The seventh assignment of error goes to the very merits of the title as between the plaintiff and defendant.

The Court below refuses to dismiss for want of jurisdiction or to entertain defendant's plea that it did not claim under a law of the United States.

The plaintiff put in evidence the claim of title of both plaintiff and defendant made before the Interior Department, found on pages 23 to 50 of the record. Before the Interior Department the plaintiff claimed the right to pre-empt the land, although it had been part of a military reservation, and defendant before the Interior Department claimed a right of way across the land under an act of Congress.

If the Court below entertained jurisdiction of this case and were justified in so doing, the plaintiff in error here has a right to have it determined in the appellate court whether or not the action of the Interior Department as a matter of law was correct in holding and determining that the defendant was not entitled to a right of way accross this land under an act of Congress of 1856. In other words, the question of plaintiffs' and defendants' title, the defendant has a right to have determined in this Court, and to review the finding of the Court below on this subject.

Seventh Assignment of Error. Plaintiff's right of possession.

The Court found and held that the plaintiffs had at all times within seven years before the commencement of this action, been entitled to exclusive possession of said tract or body of land described in the said findings and *not the land as described in the declaration.* There are two questions to be determined under this assignment of error.

1st. On the law of the case, if the Court entertained jurisdiction of this case, was the plaintiff entitled, as against the defendant, at all times, from the time defendant entered upon the land in January, 1890, to the pos-

session of said land. Defendant, in this case, by its pleas it offered to file, disclaimed attacking the patent issued to the plaintiffs and disclaimed any claim of title by defendant under the laws of the United States, and insisted that the court below had no jurisdiction to try the case.

The plaintiffs, themselves, put in evidence the record of the Interior Department and the decision of the Acting Secretary, John M. Reynolds (pages 20 to 30 inclusive of the record), and of S. W. Lamereaux, commissioner, (pages 50 to 51 of the record,) showing *defendant's claim of right of way across his land.* The commissioner and acting secretary held, in effect, that although the defendant by authority of an act of Congress, May 17, 1856,(11th Stat. at L. 15) was entitled to a right of way across any reserved public lands (See provision of the statute on page 30 of the record), yet because the *original* line of definite location, filed by the predecessor of the present railroad company, was not on the line *actually constructed* on this lot in question, but passed through lot sixteen in the same reservation, some distance north, but within the six mile limit, that the defendant company could not claim a right of way over this lot eight. The legal effect of the decision was that by filing the line of location in the Interior Department, passing through this reservation on lot sixteen, (see map, page 90½ of the record), that the defendant could not afterwards construct its road on lot 8, section 24, township 29 south, range 18 east, although within the lateral limits of its said grant, under said act of congress.

If this court determines that the court below was authorized to entertain jurisdiction of this case, we submit that it erred in deciding that plaintiffs were entitled to recover from defendant the land on which it laid its tracks on said lot 8.

The grant under which the defendant constructed its

road, to-wit, the Act of Congress, May 17th, 1856, (11th Stat at L. 15), and the proviso therein contained does not limit the right of way of any railroad constructed under said grant to the *exact piece* of land on which it fixed the line of definite location by filing of maps. It distinctly grants every alternate section designated by odd numbers for six sections in width on each side of said road, making the lateral lines six miles in width, and it further provides that on any lands reserved by the United States for public purposes that the reservation is to continue, " except so far as it may be necessary to locate the routes of said railroad, or branch, through such reserved lands, in which case *the right of way* only shall be granted subject to the approval of the President of the United States.

We submit that under this grant, the defendant was entitled to a right of way across lot 8, the land in question, as a part of Ft. Brooke Military Reservation anywhere within six miles of its located line. Where it is seeking merely to acquire *right of way*, the map of definite location is required by the Act of Congress. The map of location is only for the purpose of reserving the land grant. The right of way is given wherever it is found *necessary to locate* the routes of said railroad or branch through such reserved lands. The grant of the right of way was a grant *in presenti*, and it was intended to attach at the time of the actual locating of the route by the constructing of the road through such reserved lands. Any person acquiring any rights within the six mile limit even of the line as filed will take subject to this right of way *wherever found necessary in actually constructing the road through such reserved lands.*

The evidence filed with the chancery record (See pages 113 down to 115 inclusive, of the record) and the affidavit of Peter O. Knight (pages 10 to 12 inclusive)

clearly shows that to reach the town of Tampa as a terminal, this road necessarily had to be constructed over said lot 8, involved in this suit, and it was necessary for the purposes of the road. Under the terms of the said Act of Congress of May 17th, 1856, the right of way passed to the defendant before the alleged entry by Lewis Bell in 1883 or the patent to plaintiffs.

The authorities cited by the Commissioner of the Land office and Secretary of the Interior holding that the defendant had no right of way over this lot eight in said Reservation are not applicable, and do not sustain their decision.

The decision of the United States Supreme Court in case of Baldwin vs. Railroad Co., 103 U. S. 196, is more directly applicable to the exact language of the Act of Congress in question.

See also the case of No. Pac. R. R. Co. vs. Smith, decided May 31, 1898, Sup. Ct. Rep. Vol. 18, No. 29, page 794.

This property was a part of the Fort Brooke Military Reservation and immediately adjoins the City of Tampa, as shown by the plats in evidence in the case. The plaintiffs claim title by reason of an alleged attempted homestead entry of property by Louis Bell on the 22nd of March, 1883. The land was not subject to homestead entry, and it should have been disposed of, if disposed of at all, either as a town site, or under Section 2364 of the United States Rev. Stat. This was the decision of Secretary Teller, Vol. 2 L. D., 606, quoted on page 42 of the record in this case, but was afterwards

overruled by Secretary Smith when the patent to the plaintiffs was allowed. We submit that the holding of Secretary Teller was clearly correct. The reading of the acts of Congress permitting homestead and pre-emption claims upon pu blic lands will show that said laws were not intended to apply to portions of a Military Reservation, either in or immediately adjoining a large town. These lands were not agricultural lands, or lands which could be as regarded as homestead lands.

The Court further erred in holding that during the entire time since January 1890, plaintiffs are entitled to the possession of this property as against the defendant. As stated above, the record in the Chancery case brought by these plaintiffs in December, 1889, (found on pages 113 to 131 inclusive) show that these plaintiffs filed their bill claiming a right of possession of this land, and to enjoin the defendant from constructing its road upon the land, and thereby submitted their rights to the decision in the said cause before defendant went upon the land. At this time the plaintiffs had no patent to the land and simply claimed that Louis Bell, their ancestor, had in 1883, filed his declaratory statement, for the purpose of entering the land and afterwards offered to pre-empt and purchase the land from the United States under the pre-emption laws. This condition of affairs continued to exist until the said patent was issued to the heirs of Louis Bell on the 29th of July, 1896. (See pages 42 to 43 of the record).

On the case made in the chancery suit, his Honor Judge Pardee, made an order (found on pages 131 and 132 of the record), providing that the injunction restraining the defendant from entering upon and constructing and operating its road through the land should be dissolved upon the defendant company executing a bond in

favor of the complainants, conditoned to pay all damages that might result to complainants from said completing of said road *whenever the said complainants shall obtain title thereto from the United States,* or whenever the defendant shall obtain judgment condemning the land for railroad purposes.

It is plain that the force and effect of this order in a case in which these plaintiffs were complainants, was to give the defendant possession upon the filing of this bond. The bond was duly filed (See affidavit of Peter O. Knight, page 11, and fifth plea, page 9 of the record). From that time, the defendant's possession was a lawful possession up to the time of the issuing of the said patent, to-wit, the 29th of July, 1896. The plaintiffs were never entitled to the possession of the land used by the defendant for its track and right of way during seven years preceding the date of judgment, because during the period of time between January, 1890, and the issue of the patent on the 29th of July, 1896, the defendants were in possession of the said land under the force and effect of said order said chancery suit, and they gave bond as provided in said order, and further because the plaintiffs had no legal title during the said period of time. The title was in the United States and claimed by various different claimants, as shown by the records from the General Land Office and the Interior Department in this cause. (See pages 35, 36, and pages 27 to 50 of the record).

Eighth and Ninth Assignments of Error.

Damages and mesne profits prior to the issuing of patent or determination of the question of said title by the Secretary of Interior.

The Court below in its findings and decision determined that the plaintiffs were entitled to mesne profits from the date of the alleged entry upon the land by plaintiffs, to-wit, December, 1889, or January, 1890. This we contend is error. The plaintiffs had no title or right of possession as against the plaintiff they could *assert at law* against the defendants in possession of the property. They had only an equitable title, to-wit, under the entry of Louis Bell, made in 1883. This was disputed by numerous other claimants for the same property, as shown by the decision of the Secretary of Interior. The Secretary of Interior did finally decide the case in favor of the heirs of Bell, July 24th, 1894. (See pages 35 to 48 inclusive of the record.) The patent was not issued until July 29, 1896. This entry even had never been recognized up to the decision of the Secretary of Interior above mentioned. It was impossible for defendant to acquire title from plaintiffs by condemnation or purchase, or otherwise. The plaintiffs could not recover the land from defendant because they had no title to it. Under these circumstances, we submit that the plaintiffs could not have maintained a right of action for *mesne profits* or for rent, or any other action against the defendant up to the issue of this patent, and therefore they ought not in this action to recover damages for rents and mesne profits before the issue of said patent.

Tyler on Ejectment, page 844;

Newell on Ejectment, page 607.

Mesne profits and rents can only accompany the right to recover in ejectment in Florida. Such claims for mesne profits when joined in one action with the claim for possession, is only an incident of the main ground of the action, to-wit, recovery of possession under laws of Florida. Plaintiffs had no title up to the issue

of the patent upon which they could recover in ejectment. They had no right to put defendant out of possession then because their entry was not recognized by the United States, and because the defendants were in possession of the lands under the order in the equity suit and bond above referred to.

Revised Statutes of Fla., Sec. 1513.

Tenth Assignment of Error. Damages to Plaintiff.

The Court awarded to the plaintiffs and against the defendants, $1,955. as damages.

The evidence in this case as to the value of the property and the damages do not sustain this finding.

It was established at the trial that this land in question was wild and unimproved, and never had been used for any purpose whatever, excepting a small patch, which was in possession of the Bell heirs, and that the railroad company held possession of under said order in said chancery suit, but that plaintiffs never made anything from it, and the railroad company, at its own expense, put the fence up again, so that they were really not damaged by the taking. The value of the land in dispute beyond question was proved to be worth not more than one thousand dollars per acre. There was no proof upon the part of the plaintiffs that they were ever damaged one iota by the taking of this property. There was no proof that they had ever used it for any purpose, although they had been in possession of it for years, and no proof that they had ever attempted to lease any part of it, or that they could lease any part of it, or that they could sell any part of it, or that they could have used it to any advantage whatever. Plaintiffs could only recover for their damnges, as to a little more than one acre of ground, and it is evident from the finding that the Court

sustained this contention. The defendant should not have paid the Bell heirs any compensation for use of property in January, 1890, and should not have paid them any compensation until the patent was issued. When the patent issued in 1896, defendant could, for the first time, with safety deal with them, and they were only entitled to a fair rental valuation on the property, taken from July, 1896, until the time of the trial. No one would have purchased or rented this property from the Bell heirs in 1890, because there were a number of litigants for the property, and the only thing that the railroad company could have done, would have been to have condemned against all the parties in interest and if they had, the money would have been paid into the registry of the Court and the Bell heirs would not have received the same, until the patent was issued, so that they would not have been benefited one iota by the payment of the money by the railroad company on account of condemnation proceedings.

The Bell heirs could not have used this land for any purposes of aleniation, prior to the issuing of the patent, and certainly no one would have leased this property from them, as it was worth nothing for use, nor for the erection of buildings upon it, on account of the state of the title. Under the homestead laws they could not alieniate it. More than that, there was no evidence to prove, nor did the plaintiffs attempt to prove, that during all the period of years before the trial, that they ever had an opportunity of renting, using or leasing any portion of it, or that it had any rental value. The Court below found that the plaintiffs were entitled to one and three-eighths acres, or in that neighborhood, from January, 1890, and estimated the damages thereon. The Court should have estimated the damages to be just the loss the Bell heirs had proven resulted to them, by reason of the

withholding of the property from them from July, 1896. The Court should then have found that the value of the property in July, 1896, was one thousand dollars per acre; and a rental based on that valuation, or if permitted to base said rental on interest upon said valuation, that plaintiffs were entitled to interest on said valuation as rental, from July, 1896, at the rate of eight per cent. per annum, to the time of the trial, and should have made the damage somewhere in the neighborhood of $125 or $150, and that is absolutely all that they were damaged in this case.

The only proof in this case which was strictly competent upon which to base damages was proof of the rental value, or proof of some amount that the plaintiffs might have secured for the use of the property, while the title was in dispute in the Interior Department. There is no proof of this kind in the Record. There is no proof that it could have been rented for any figure, or that it had any rental value.

Interest upon the different valuations placed by one set of witnesses or the other set of witnesses now upon the land is no legal measure of damages for retaining possession of the land.

See Newell on Ejectment, page 609, Sec. S:

Lawrence vs. Rector, 137 U. S., 139;

New Orleans vs. Gaines, 131 U. S., 191.

Interest on the value of the land is not a proper element of damage.

See Sedgwick vs. Waite on trial of title to land, Sec. 667.

The plaintiffs should have proven that this vacant land had a rental value and that if the plaintiffs had re-

mained in possession of it, they either could have rented it for a given sum, or that they lost the use of it and by the use of it they could have made some sum of money proven. No such proof was made in the case.

Eleventh and Twelfth Assignments of Error.

The eleventh and twelfth assignments of error are in effect that the Court found a judgment in favor of plaintiff to recover an entirely different piece of land from that described in the declaration, and further that the Court Court could not make any finding or judgment for recovery on the description in the declaration, the same was too vague and indefinite upon which to base any judgment or finding. A comparison of the land described in the judgment of the Court, with the delaration, will show that the Court attempted to work out its own description of a different piece of land from that described in the declaration. An examination of the land decribed in the declaration will show no sufficient metes or bounds or measurments are given to describe the land sued for. No judgment or right of possession thereon could properly be executed on the land described in said declaration.

In Florida the judgment in an action of ejectment must describe exactly the property recovered and must find a right of possession in the plaintiff of that particular land, and must state the quantity of the estate of the plaintiff in the particular piece of land described in the verdict and judgment.

Horne vs. Carters, Admr. 20, Fla., 51;
Ashmead vs. Wilson, 22 Fla., 255;
Sedgwick & Wait on Trial of Title, etc.;
Sec. 457, 458, 459, 463.

Section 1515 of the Revised Statutes of the State of Florida is as follows: "A verdict for the plaintiff shall state the quantity of the estate of the plaintiff and describe the land *by its metes and bounds*, by the number of the lot or other certain description." The judgment awarding possession shall in like manner state the quantity of the estate, and give a description of the land recovered.

In order to carry out and enforce this statute the declaration must state a sufficient description and the finding must follow the land described in the declaration.

See Asa vs. Hiser, 27 Fla., 378;
Patrick vs. Young, 18 Fla., 50;
Lungren vs. Brownlie, 20 Fla., 491;
Neal vs. Spooner, 20 Fla., 38;
Slacum vs. Pomery, 6 Cranch, 221.

Judgment Not in Accordance With Findings.

The findings in this case find that William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, and Matilda P. Feihe, nee Bell, have and own an undivided one-sixth part and interest in said land, and that George A. Bell, and Simon Bell have and own each one undivided one-twelfth part and interest in the said land.

The judgment in this case adjudges that all of the plaintiffs recover from the defendant the sum of $1,954.00, and that the plaintiffs have a fee simple title in and to the lands and premises described, as follows, (describing the lands): There is no judgment for their undivided interest, and the *judgment does not award possession of their undivided interest*, or adjudge their title to their several undivided interests in accordance with the findings. The judgment, therefore, is not supported by the findings and

should be reversed. As far as there is any judgment, it is a joint judgment in favor of each and all of these parties, that they each and all of these have a fee simple title to the entire tract (not specifying what their interests are). This is not in accordance with the findings or with the statutes of the State of Florida above cited.

The declaration in this case is a joint declaration seeking to recover the entire property, but states that all of the plaintiffs, except George A. Bell and Simon Bell are heirs of and children of Louis Bell, and that George A. Bell and Simon Bell are heirs of and grand-children of the said Louis Bell.

The findings find that they have undivided interests, as above stated, in the property. The judgment does not adjudge anything in favor of the plaintiffs as to the right of possession and adjudges that all of them have a fee simple title to the entire property. The judgment does not conform to the declaration of the findings. The findings stand in the place of a verdict, and the judgment in ejectment must follow the verdict as to the question of interest, estate, right of possession and land to be recovered.

As we have heretofore argued, there is not a sufficient description of the property in the declaration to warrant any judgment, nor to authorize the recovery of the tract of land attempted to be described in the findings, and no sufficient description even in the findings upon which to base a writ of possession.

We submit that for the reasons hereinbefore stated that the judgment in this cause should be reversed and the cause remanded.

J. A. Henderson
E. Cooper
Attorneys for Plaintiffs in Error.

No. 95.
Supp. Brf. of Plff. in Err.

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OCTOBER TERM, 1899.

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THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM J. BELL ET ALS., DEFENDANTS IN ERROR.

Supplemental Brief for Plaintiff in Error.

WILLIAM WIRT HOWE,
For Plaintiff in Error, Defendant Below.

OCTOBER 24, 1899.

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Supplemental Brief for Plaintiff in Error.

A brief has already been filed in this cause by my learned associates, to which reference is made for a statement of the salient facts in the case.

The assignment of errors is found in the Transcript, printed pages 182–185.

ASSIGNMENT OF ERRORS.

First. The circuit court held and decided that, although William J. Bell and John W. Bell, of the plaintiffs, were citizens of the State of Texas; Frank A. Bell, E. A. Bell, Matilda P. Feihe, George A. Bell, and Simon L. Bell, of

plaintiffs, were citizens of the State of Florida, and defendants a corporation organized and existing under the laws of the State of Florida, said court had jurisdiction of said cause, and said court of appeals erroneously affirmed said ruling, and this decision and the ruling of said court of appeals is hereby assigned as error.

Second. The court below held and decided that, although the defendant admitted that before the commencement of the suit in ejectment a patent was issued from the United States to the plaintiffs for the land described in plaintiffs' declaration, and that defendant did not, at the time of the commencement of the suit nor at the time of the filing of the pleas, claim and insist that plaintiffs derived no title to the said land, and although the defendant insisted that it did not claim any title to the said land under the laws of the United States of America or under any act of Congress or any law of the United States, but that it admitted absolutely the title of the plaintiffs under and by virtue of the patent issued, yet that said circuit court had jurisdiction of said cause; and said circuit court of appeals erroneously affirmed said ruling, and this decision and ruling of said court of appeals is hereby assigned as error.

Third. That the circuit court refused to permit the defendant to file the additional pleas numbered 2, 3, 4, and 5, and the said court of appeals erroneously affirmed said ruling, and this decision of said court of appeals is hereby assigned as error.

Fourth. The circuit court refused to grant defendant's motion to dismiss for want of jurisdiction, and the said court of appeals erroneously affirmed said ruling, and this decision and ruling of said court of appeals is hereby assigned as error.

Fifth. The circuit court refused to grant defendant's motion to continue said cause for the reason that the condemnation suit was pending, and the court of appeals erroneously affirmed said ruling, and this decision and ruling of said court of appeals is hereby assigned as error.

Sixth. During the trial of said cause in the circuit court the defendant there offered in evidence a certain chancery suit instituted in December, 1889, by plaintiffs against defendant to enjoin the defendant from entering on the land described in plaintiffs' declaration, in which said chancery suit the fact was set forth fully that no one at said time had title to said land, and in which said chancery suit an order was made by the Honorable Don A. Pardee, as judge of the United States circuit court, permitting the defendant to enter upon said lands and construct its tracks thereupon, conditioned that it should acquire title by condemnation whenever a patent was issued by the United States Government to plaintiffs, said proceedings being introduced for the purpose of showing the manner and good faith of the entering upon said land by defendant, and the circuit court did decline to permit the defendant to introduce said chancery record in said cause as evidence; which ruling the said court of appeals erroneously affirmed, and this ruling and decision of said court of appeals is hereby assigned as error.

Seventh. That the circuit court erred in finding and deciding, as a matter of law, that plaintiffs have at all times within seven years next before the commencement of this action been entitled to the exclusive possession of said tract or lot of land hereinafter described, and entitled to such an amount, in the form of damages and mesne profits, as would fully compensate them for any damages that have been sustained and any loss of rents and profits which have been caused by the unlawful trespass and possession of the de-

fendant below, and this ruling was erroneously affirmed by said court of appeals, and this ruling of the court of appeals is hereby assigned as error.

Eighth. That the circuit court erred in finding that plaintiffs below were entitled to damages for any mesne profits prior to the date of the issuance of the United States patent to them, and this ruling was erroneously affirmed by said court of appeals; which ruling of said court of appeals is hereby assigned as error.

Ninth. That the circuit court erred in finding that the plaintiffs were entitled to damages and to mesne profits prior to the time that there was a final adjudication as to the right and title of the litigants to this property by the Secretary of the Interior, and this ruling was erroneously affirmed by the said court of appeals; which said decision of said court of appeals is hereby assigned as error.

Tenth. That the circuit court erred in finding as a matter of fact that in damages and in the loss of rents and profits the plaintiffs have been injured and damaged to the extent of one thousand nine hundred and fifty-five dollars, and this ruling was erroneously affirmed by the said court of appeals; which decision of said court of appeals is hereby assigned as error.

Eleventh. The circuit court held and decided that although there was no description by metes and bounds or otherwise in plaintiffs' declaration of the land in controversy, as required by the statute of the State of Florida, yet the court held and decided that the plaintiffs below were entitled to their respective shares, as set forth in the findings of the court, to the following-described lot or tract, to wit: A strip and parcel of land, being a part of lot eight, section twenty-four, township twenty-nine south, range eighteen east, of the

meridian of Tallahassee, State of Florida and county of Hillsborough, known and described as follows, to wit: Beginning at a point in the east boundary line of said lot eight at a distance of seventy-five feet in a south direction from the northeast corner of said lot, running southwesterly parallel to the northwesterly boundary line of said lot to the western boundary line of said lot eight fourteen hundred and twenty-four feet (1,424 feet); thence south on said western boundary line 75 feet; thence northeasterly on a line parallel to the said northwestern boundary line of said lot to the eastern boundary of said lot; thence north along said eastern boundary line 75 feet to the place of beginning; and the said court of appeals erroneously affirmed said rulings, and this finding of law and fact by and action of the said court of appeals is hereby assigned as error.

Twelfth. That the circuit court erred in finding that there was any description in the declaration or any description of the land in controversy in evidence sufficient upon which to base a finding of judgment contemplated by the statutes of Florida, and this ruling and finding were erroneously affirmed by said court of appeals, and this action of said court of appeals is assigned as error.

And for these and other errors apparent on the face of the record plaintiff in error, defendant in the circuit court, prays that the judgment of said court of appeals rendered on May 24, 1898, be reversed, and that the judgment of the said circuit court be directed to be reversed, and for costs and general relief.

ARGUMENT.

The primary question on the writ of error is raised by the first four assignments, and concerns the jurisdiction of the court of first instance, which was the circuit court of the United States for the southern district of Florida.

It will not be contended that this court of first instance had jurisdiction by reason of diverse citizenship. It could only have had jurisdiction on the ground that the case was one "arising under the laws of the United States."

A case in law or in equity may be said to arise under the laws of the United States when its correct decision *depends* on a construction by the court of those laws.

Cohens *vs.* Virginia, 6 Wheaton, 264, 379.

The character of a case is determined by the questions involved. These questions must be real questions at issue, upon which a correct decision depends, and not abstract or narrative propositions, stated by a pleader, on which the decision does not depend, and as to which a decision may be reached without considering them. If from the questions really at issue it appears that some title, right, privilege, or immunity, on which the recovery depends, *will* be defeated by a necessary construction of a law of the United States or sustained by an opposite and necessary construction, or if the validity of the law must necessarily be affirmed or denied by the court, the case will be one arising under the laws of the United States within the meaning of that term as used in the judiciary acts, and otherwise not.

The ancient Fictions of English law, by which, for example, the courts of King's Bench and of Exchequer usurped the jurisdiction of the common pleas by averments on the part of plaintiff, in the one case, that the defendant was in custody of the King's marshal, and in the other that the plaintiff was the King's debtor (Maine's Ancient Law, 3d Am. ed., p. 25), were instances of a struggle for judicial power or for a favorite forum, which belong to a time long past and have no place in our federated nationality.

If a plaintiff, in the absence of diverse citizenship, can go into the United States circuit court by merely including in his declaration historical statements with respect to his chain of title to the land he claims, in which an act of Con-

gress is referred to, the well-established boundaries of jurisdiction will be invaded in the desire to make choice of a forum as a matter of personal desire.

Such an attempt was defeated in Muse *vs.* Arlington, &c., Co., 168 U. S., 430, 435, where the allegations by plaintiff as to a treaty of the United States were held not to confer jurisdiction on the circuit court, whose jurisdiction is not presumed, but must clearly appear. The language of this court in that case is noteworthy in its application to the contention at the bar in the instant case:

"Some right, title, privilege or immunity, dependent on the treaty must be so set up and claimed as to REQUIRE the circuit court to pass on the question of *validity or construction* in disposing of the right asserted."

And see the cases there cited by his honor the Chief Justice.

In Pratt *vs.* Paris, etc., Co., 168 U. S., 255, 259, there was controversy as to certain rights under patents of the United States for inventions, which patents resemble in some respects patents under land laws (U. S. *vs.* Am. B. Tel. Co., 128 U. S., 315, 366). The defendants The Paris Company set up in the State court, among other defenses, the invalidity of the patents, and evidence as to the invalidity of the patents as infringements of a prior patent to another person was objected to on the ground that the circuit courts of the United States only could have jurisdiction of such a matter. It was held by your honors that the action did "not arise under the patent-right laws of the United States in any proper sense of the term." We do not say that the case was on all-fours with the one at bar in all respects, but we refer to its underlying principle and to the authorities cited by his honor Mr. Justice BROWN.

The case of Leyson *vs.* Davis, 170 U. S., 36, 39, may also be referred to.

In White *vs.* Leovy, 174 U. S., 91, 96, it was held that

there was no Federal question, although plaintiff set up allegations and contentions, referring to acts of Congress, concerning swamp lands, United States patents of the same, and official plats of a United States surveyor.

In Third Street, &c., Co. *vs.* Lewis, 173 U. S., 457, 460, where the complainant set up a sale by a Federal court, it was held that this fact did not in itself give the circuit court jurisdiction, unless it appeared by the plaintiff's statement to be a "necessary" part of his claim.

In Tennessee *vs.* Bank, 152 U. S., 454, 460, it was reiterated that "a suggestion of one party that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws."

In Hanford *vs.* Davies, 163 U. S., 273, 279, it is said to be settled as to a circuit court that "the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears; and that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleading, but the averments should be positive." The case seems quite as strong in favor of the jurisdiction as the one at the bar, but jurisdiction was denied by the court.

Now, in the light of these precedents and many others cited in the opinions referred to, we beg to inquire what are the averments of plaintiffs below in their declaration, and what they do not aver. The declaration is found at pages 3–5 of the Transcript. As to matter now in hand, it may be divided into two parts:

First. The narrative statement at page 4 that the plaintiffs below claim title under a patent (which is copied at page 24 of the Transcript and was issued July 29, 1896), and that in sundry proceedings in the Department of the Interior the railroad company, defendant below, opposed their claim for the patent without success, and especially under the granting act of May 17, 1856. This is a mere

history, concerning a contest that had been ended by final decision of the Interior Department. It requires no construction of the law of 1856, nor any decision as to its validity, and could give no jurisdiction to the circuit court. "The incident was closed."

Second. A narrative statement, which is *verbatim*, as follows (pp. 4, 5):

"And plaintiffs allege that after the passage of an act of Congress entitled, 'An act to provide for the disposal of abandoned and useless military reservations,' approved July 5, 1885, they contended for and claimed title to and a patent to the said parcel of land, under and by virtue of the first proviso of the second section of the last-mentioned act of Congress, both in the office of the said General Land Office and of the Secretary of the Interior, and the defendant appeared in both of the said offices by its counsel, and there claimed and contended and at the commencement of this suit claimed and contended, that plaintiffs were not entitled to said parcel of land under the said proviso of the said act of Congress, and at the times aforesaid, claimed and insisted that it was entitled to locate the route of its railroad through said parcel of land, and to be in the possession thereof under and by force of the third proviso of the aforesaid act of Congress, approved May 17, 1856."

This statement seems also to be purely historical, and to refer to incidents that are closed. A jurisdiction in the circuit court cannot be justly inferred by argument from them; but if it can be, by the skill of learned counsel, such an inference, as stated in Hanford *vs.* Davies, 163 U. S., 279, will not do. It must appear affirmatively and positively that a decision as to the validity or construction of those laws is "required." If the paragraph quoted can by expert argument be held to mean that the railroad company may or will set up a claim under those laws, the result is the same; for, in the first place, such an argument will not confer jurisdiction, and, in the second place, "a suggestion of

one party that the other may or will set up a claim under the Constitution or laws of the United States does not make the suit one arising under that Constitution or those laws."

Tennessee *vs.* Bank, 152 U. S., 460.

Let us now see what the plaintiffs below do not aver in their declaration:

(*a.*) They do not declare that they claimed and obtained their patent under one construction of the laws of the United States which are referred to, and that the defendant company sets up and insists on an opposite construction which will deny their right and sustain its own.

(*b.*) They do not aver that they are claiming those laws to be valid and the defendant company claiming them to be invalid.

(*c.*) They do not make any averment which presents in the form demanded by this court any "question" or "issue," or anything "positive," in such way "as to require the circuit court to pass on the question of validity or construction [of these laws] in disposing of the right asserted."

Muse *vs.* Arlington, 168 U. S., 435.

Hanford *vs.* Davies, 153 U. S., 279.

We submit that the circuit court had no jurisdiction.

The circuit court of appeals, in its opinion maintaining the jurisdiction of the circuit court (pp. 180, 181), refers to the fact that the defendant below has resisted the claim of plaintiffs below for mesne profits; but the answer to this is that the plaintiffs below did not formulate any controversy on this point in such way as to make a case arising under the laws of the United States, nor did the defendant below assist to make any such case. The question of mesne profits as an incident of success on the part of the plaintiffs below does not appear as a Federal question. We

submit that it was and is a question of the law of Florida concerning land long ago severed from the national domain.

Whether plaintiffs below could have an executory judgment in ejectment against a railway company as to its right of way and a judgment for mesne profits as ancillary and have it as rendered in this cause is a question under the laws of Florida. It is so discussed in the brief of our associates, pp. 28, 29, 36. It was so discussed in both of the lower courts under the same assignments of error (Transcript, pp. 16–18).

If, as we have sought to show, the plaintiffs below propounded no case arising under the laws of the United States, these contentions of the railway company cannot, as it seems to us, confer a jurisdiction on the circuit court.

As to the other points in the cause, reference is made to the brief filed April 5, 1899.

Respectfully submitted.

WILLIAM WIRT HOWE,
For Plaintiff in Error, Defendant Below.

OCTOBER 24, 1899.

No. 332. 95

Motion to dismiss or Affirm.

Filed Dec. 27, 1898.

Office Supreme Court U. S.
FILED
DEC 27 1898
JAMES H. McKENNEY,
Clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

THE FLORIDA CENTRAL & PENINSULAR RAILROAD COMPANY,
Plaintiff in Error,
vs.
WILLIAM J. BELL, ET. AL.,
Defendants in Error.

No. 332.

Motion to Dismiss or Affirm.

Come now the defendants in error by H. Bisbee, their attorney, and move to dismiss the writ of error in this action, or affirm the judgment, upon the following grounds :

First—Because no writ of error lies as matter of right to review the judgment of the Circuit Court of Appeals. The question of jurisdiction was raised in the Circuit Court by plaintiff in error, and judgment went against it on that question and on the merits, and on writ of error, the Circuit Court of Appeals affirmed that judgment.

Second—On the ground that it was an action in ejectment and the plaintiff in error, defendant in the Circuit Court, admitted of record that it had no title, and therefore the only question it could raise was one of jurisdiction, and that has been so often upheld by this Court in like cases as to need no further argument.

Third—On the ground that if the writ of error does lie there is no basis in the record for the assignments of error, and they should be treated as stricken out, and the judgment affirmed.

N Bisbee
for defendants in Error

Please take notice that the foregoing motion will be made and submitted to the Court on Monday, the sixteenth day of January, 1899.

N Bisbee
for defendants in Error

To JOHN A. HENDERSON, ESQ.,
J. C. COOPER, ESQ.,
W. W. HOWE, ESQ.,
Attorneys for Plaintiff in Error.

No. 332. 95

Brief of Bisbee for M. C.

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IN THE SUPREME COURT OF THE UNITED STATES.

THE FLORIDA CENTRAL & PENINSULAR RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

WILLIAM J. BELL, ET. AL.,
DEFENDANTS IN ERROR.

No. 332.

BRIEF ON MOTION TO DISMISS WRIT OF ERROR OR AFFIRM THE JUDGMENT.

Statement of Facts.

On December 12th, 1896, defendants in error brought an action of ejectment against the plaintiff in error in the Circuit Court of the United States for the Southern District of Florida, to recover possession of a strip of land upon which defendant below had built a railroad, and for mesne profits during the occupation.

The declaration claimed title under a patent granted on a pre-emption claim filed in the local Land Office in 1883, and duly prosecuted by Louis Bell, Senior, and plaintiffs below, his heirs, until patent was granted, to wit: July 1896.

The plaintiffs also claimed mesne profits during the occupation by defendant Company both before and after patent issued.

The declaration also alleged that the defendant Company at all times during the proceedings in the local Land Office, and in the general Land Office of the Government, and before the Secretary of the Interior of the United States, resisted the right of the said Lous Bell, and his heirs, to patent to the land in question, and that the defendant Company claimed the right to locate and maintain its line of railroad on said land, under a law of the United States.

Declaration, Record, page 3.

The defendant Company, on February 1st, 1897, filed a plea of "Not Guilty." Record, page 5.

Sub-division 2, Section 1513 Revised Statutes of Florida, page 513, reads as follows, to wit:

"2. PLEA—The plea of "Not Guilty," shall put in issue the title of said land in controversy."

"Such plea shall be held to admit the possession of the defendant, or in case of an adverse claimant, the adverse claim of the defendant. Should the defendant wish to deny possession it shall be done by special plea."

On February 5th, 1897, after time for pleading expired, defendant moved for leave to file the four additional pleas numbered 2, 3, 4 and 5 respectively, *but it did not offer to withdraw the plea of "Not Guilty."* Record, pages 7 to 9.

On February 18th, 1897, the Court refused leave to file said special pleas on the ground that none of them constituted a defence which could be made under the plea of "Not Guilty." Record, pages 9-10.

On the 10th day of February, of said year, the defendant made a motion for continuance, based on an

affidavit stating that it had condemnation proceedings pending in the State Court to acquire an easement over the said lands. It asked for a continuance until such condemnation proceedings could be terminated. Record, page.

This motion was denied. Record, pages 10 to 12.

On the 5th of March, 1897, the defendant Company made the following motion, to wit:

"Now comes the defendant in the above cause on this day, and moves the Court to dismiss the said cause for the reason that there is nothing upon the face of the declaration to show that this Court has jurisdiction to hear and determine the said cause." Record, page 12.

This motion was denied on the 11th day of March, said year. Record, page 12.

On the 11th day of March, said year, the parties waived a jury and agreed that the cause might be tried by the Court. Record, page 13.

On March 23rd, the Court found in favor of the plaintiffs and rendered judgment for possession, and nineteen hundred and fifty-five dollars, ($1,955), for mesne profits, and from that judgment the defendant Company prosecuted a writ of error to the Circuit Court of Appeals for the Fifth Circuit, and on May 24th, 1898, said judgment was affirmed by the Court of Appeals.

87 Fed. Rep. 369;

Findings of Court on page 14.

The case is now in this Court on writ of error to review the said judgment.

Argument.

This motion to dismiss the writ of error is based on the following grounds:

I.

The defendant in the Circuit Court raised the question of jurisdiction, which was decided against it. Judgment went against defendant, and it took the whole case on the question of jurisdiction and the merits to the Circuit Court of Appeals, and the Circuit Court of Appeals did not certify the question of jurisdiction to this Court.

The second plea offered, leave to file which was denied by the Court, and affidavit for continuance *distinctly admits that defendant had no title to the land in controversy, and sought to defeat the jurisdiction of the Court by such admission.* See Proposed Plea 2, Record, page 7. Affidavit, page 10.

The Circuit Court of Appeals held that the only question before it on the assignments of error which it needed to examine was a question of jurisdiction. See 87 Fed. Rep., 371, 373. And the plaintiff in error in this Court has filed the same *identical assignments of* error that it did in the Circuit Court, and the only error assigned which is assignable, if any is, is one challenging the jurisdiction of the Circuit Court, and for this reason the plaintiff in error ought to have brought the case before this Court directly by writ of error from the judgment of the Circuit Court, and no writ of error lies as matter of right to review the judgment of the Circuit Court of Appeals.

See Assignments of Error in Circuit Court, page 16.

See Assignment of Error in the Court of Appeals, page 182.

But, if such writ does lie, the defendant, having admitted of record, that it does not claim title, and has no defense, the only question that can possibly remain is that of the jurisdiction of the Court. That question has been so often decided by this Court, sustaining jurisdiction in cases identical with this, that it is frivolous.

II.

The writ should be dismissed on the ground that there were no exceptions taken upon which error can be assigned; and there is no basis in the record upon which assignment of errors can rest.

Argument.

Twelve errors are assigned in this Court. *They are exact repetitions of the assignments in the Court below,* adding the words: "*The Court of Appeals erroneously affirmed said ruling*" (*of Circuit Court.*)

There is *no specification in any one of these assignments of the grounds of the alleged errors,* therefore there is nothing to review.

See Assignments, Record, page 182.

The Court of Appeals declined to review any assignment of error, except the one challenging the jurisdiction of the Circuit Court.

87 Fed. Rep., 373.

And defendant, having admitted it had no *title,* there was no other question for such Court to review.

FIRST ASSIGNMENT OF ERROR.

The first error assigned, Record, page —, is that the Court below erred in holding that it had jurisdiction on the ground of citizenship of parties. There is no basis in the record for this assignment of error. 87 Fed. Rep., 373.

There is nothing in the record establishing that the Court below held that it had jurisdiction on the ground of citizenship. The only mode in which defendant raised the question of jurisdiction was by motion to dismiss upon the ground that on the face of the declaration, no jurisdiction was shown. Record, page 12.

And this was repeated in the so-called bill of exceptions, Record, page 170.

But, if the Court of Appeals held there was jurisdiction because of diverse citizenship this Court has no jurisdiction to review it.

FOURTH ASSIGNMENT OF ERROR.

The fourth error assigned is for the refusal of the Court to dismiss for want of jurisdiction. Record, page 183.

The facts stated in the declaration established jurisdiction on two grounds.

1. Because the plaintiffs claim title as patentees, or as heirs of Lewis Bell, under a patent from the United States, upon a pre-emption claim under the laws of the United States, and the declaration alleges that the defendant insists that the plaintiffs derived no title to the said land by virtue of said patent.

It has several times been held that where the plaintiff claimed *title directly under a patent from the United*

States, and defendant denied such title, the case was within the jurisdiction of the Court.

125 U. S., 618-620.

Pierce vs. Molliken, 78 Fed. Rep., 196, (Reported since the decision of the Court below.)

That case is almost identical with this branch of the present case. In that case the question was raised by demurrer to the declaration, and in this case, by motion to dismiss.

Also Evans vs. D. L. & W. Coal Co. (8th Circuit Court of Appeals), 80 Fed. Rep., page 433.

That case is identical with the case at bar, both on the ground that plaintiffs claim title under a patent, and *mesne profits before patent issued*, under the doctrine of relation of the title to the date of the initiatory steps to obtain title under the laws of the United States. That, like this, was a case under the pre-emption laws.

The case of Spokane Falls &c. R. R. vs. Zeigler, 167 U. S., 65, is decisive upon both points, to-wit:

Jurisdiction, because of claim of title under the laws of the United States, and because of the claim for mesne profits for use and occupation before the patent issued. That case in principle is identical with the case at bar.

The challenge to the jurisdiction after so many decisions sustaining *it, is frivolous.*

The plea of not guilty put the title in issue.

Rev. Stats. of Fla., Sec. 1513,
giving the form of the declaration, and the effect of the plea of not guilty, and citing the decisions in numerous cases by the Supreme Court of the State.

And it was the issue raised upon that plea upon which the case was tried.

SIXTH ASSIGNMENT OF ERROR.

This assignment alleges error in excluding the record of a chancery suit between the parties to this case, offered by the defendant. Record, page 183.

The defendant offered this record for the purpose of showing *good faith* of the defendant in entering upon the tract of land. The Court sustained the objection to its admission because there was no claim to vindictive or exemplary damages, and consequently the question of good faith was not in issue. Record, page 113.

The record of the suit is in the Record, pages 113 to 140 inclusive. It simply establishes that the heirs of Bell, in the latter part of 1889, brought a suit to enjoin the defendant company from constructing its road across the land in question, on the ground that they had the right of pre-emption under the pre-emption laws of the United States, and would prosecute their claim to a patent.

The Court granted the injunction, but provided that it might be dissolved: (1) Upon the defendant obtaining a decree of condemnation: (2) Upon giving bond conditioned to pay all damages that might result to the complainants in the construction and building of its railroad whenever the complainants should obtain title from the United States.

There was no plea filed in abatement on the ground that another suit was pending, and if such a plea had been filed, it would have been unavailing.

Kittredge vs. Race, 92 U. S., 116.

101 U. S., 301;

And it is manifest that the suit in equity was not for the same purpose as the ejectment suit. The object of the equity suit, to-wit: enjoining the construction of the road had been defeated by the defendant giving bond and building the road, and after patent was obtained, the proper remedy of the plaintiffs to recover possession and mesne profits was by ejectment. Had the equity cause gone to a final decree plaintiffs might, after patent was obtained, enjoined the defendant from operating its road, *but it is exceedingly doubtful whether the Court of Equity had jurisdiction*, even on a supplemental bill to have decreed damages for use and occupation, and for injury to the realty.

SEVENTH, EIGHTH AND NINTH ASSIGNMENTS OF ERROR,

go to the point that the Court erred in finding, as matter of law, that the plaintiffs were entitled to recover for mesne profits and damages prior to issuing the patent, which question is disposed of, against the contention of plaintiff in error by the cases in

80 Fed., Rep., supra,

22 Fla., 255, 261-2,

167 U. S., supra,

and by numerous other cases unnecessary to cite.

This contention is frivolous.

TENTH ASSIGNMENT.

This for finding amount due for mesne profits; *a finding of fact, not reviewable.*

There is no basis in the record for the Seventh, Eighth, Ninth and Tenth Assignments of Error. Record, pages 170, 171.

These pages *include four distinct findings of law and fact*, and the only exception thereto is on page 171, and is as follows, to-wit:

"*To which findings of law and fact, the defendant then and there excepted and alleges and complains that the Court erred therein.*"

This is not such an exception as the Court can review. It states no ground of exception whatever, and no assignment of error can be based thereon.

ELEVENTH AND TWELFTH ASSIGNMENTS OF ERROR.

These assignments go to the point that there was not such description of the width of the right of way occupied by the defendant, in the declaration, as to enable the Court to determine the width of said right of way, and the quantity of land occupied by the defendant. In other words, that the Court could not determine from the declaration, and upon the evidence, the area of land for which the plaintiff should have judgment and the amount of damages to be sustained for use and occupation. This finding of the Court is on page 171.

This was a finding of a fact.

FIFTH ASSIGNMENT OF ERROR

Is for refusal to grant the motion for continuance, on the ground that a condemnation suit was pending. It will be sufficient to say that refusal to grant a continuance is not reviewable; but it is well settled that the pendency of a condemnation proceeding is no bar to a suit in ejectment, or for mesne profits, or for damages.

2 Woods R. R. Law, 292, 293 and Notes.

This for the obvious reason that the judgment in condemnation proceedings is to pay the value of the

property. Liability for mesne profits and damages to the realty are not involved in such a proceeding.

Moreover, after judgment, the plaintiff may abandon the condemnation proceedings, and the judgment becomes null and void, unless the defendant pays the amount he is condemned to pay within ten days after judgment.

Rev. Stats. of Fla., Sec. 1555.

Again, a judgment in condemnation does not give the defendant a fee simple title, but only an easement.

Rev. Stats. Sec. 1554.

The plaintiff is entitled to have the question of title settled, so that in case the defendant should subsequently vacate the premises, the right to possession under the title would revert to the plaintiff.

2 Woods R. R. Law, page 915, and notes.

The condemnation proceedings are in the Record p. 144. On Record p. 148 it will be observed that the petition of the defendant for condemnation of the land was *dismissed.* After plaintiff in ejectment in such a case recovers a judgment, the Court in some jurisdictions on a proper showing will give defendant a short time to proceed to acquire the land by condemnation, but it is no ground to stop the trial of the ejectment suit.

THIRD ASSIGNMENT OF ERROR.

This alleges error for refusal to permit the defendant to file additional pleas numbered two, three, four and five, which pleas are in the Record pp. 7 to 9 inclusive.

The refusal by the Court of leave to file pleas is not reviewable. It was discretionary 142, U. S., 128.

The time to plead as a matter of right has passed.

The second proposed plea attempts to defeat the jurisdiction of the Court by averring that under the patent, the defendant did not deny at the *time suit was brought* that the plaintiff had title to the premises, coupled with an averment that the defendant admits that *at the time of the commencement* of this suit, it had no title.

The third proposed plea attempted to set up that one of the plaintiffs was non compos mentis. The plea of not guilty is a plea to the merits, and a plea to the merits waives the question of competency to sue, and also waives jurisdictional questions, so far as they can be waived.

14 How., 510;

3 Wall., 420-423.

There is no law in Florida which prohibits a wife, who is non compos mentis, from being joined with her husband, as in this case in an action in ejectment. The title is still in her. She may sue by guardian, *but it is not compulsory.*

Revised Statutes of Florida, Section 982.

Besides, the plea was bad in not alleging defendant had been *adjudged a lunatic.*

23 Fed., 168;

87 Fed., 374.

The fourth proposed plea admits that the defendant is a trespasser, and that condemnation proceedings had been instituted, and there is no merit in it.

The fifth proposed plea was setting up the pendency of the equity suit already spoken of, which suit was not for the same object and purpose as this suit, and it contained no merit.

SECOND ASSIGNMENT OF ERROR.

This assignment of error asserts that the Court below held it had jurisdiction, notwithstanding the defendant insisted that it did not claim a title to the land under the laws of the United States, and admitted the title of the plaintiffs under the patent.

There is nothing in the Record establishing that the Court ever rendered any such decision. The Court disposed of the application to file all the additional pleas by an order found on page 9 of the Record. The order simply held that none of the pleas constituted *any defence which could not as well be shown under the general plea of not guilty, without prejudice to a motion for stay of execution until judgment on condemnation proceeding.*

The proposed plea ought not to have been filed for several reasons:

First. It was inconsistent with the plea of not guilty which plea the defendant never proposed to withdraw. Under the plea of not guilty, the defendant had the right to introduce evidence, and contend that the plaintiff had no title and had no right to mesne profits.

Second. Because the proposed plea No. 2, *was not a disclaimer of any interest in the subject matter of the suit.*

Third. Because as the record shows, but a short time before the suit was brought, the defendant did claim a right of way over the lands under the laws of the United States. See Letter of the Commissioner of the General Land Office, to the Local Land Office, Record, page 50, and the decision of the Secretary of the Interior on appeal to the Commissioner of the General Land Office, Record, pages 29 to 35 inclusive.

The plaintiffs therefore had the right to allege just what they did allege, to-wit: that the defendant denied

its title, and right to mesne profits. *Just at what moment of time* the defendant concluded to admit title in plaintiffs whether before or after the suit was brought, we think it would be impossible to prove or disprove. The plea does not distinctly disclaim a right of way. It does not admit a right to mesne profits.

But the case of Osborne vs. The Bank, 9 Wheat, *supra*, disposes of this, where it was held that if the declaration showed a case within the jurisdiction of the Court it is immaterial whether the defendant raised any objection or not.

Fourth. Because the admission of title in the plaintiff under the patent would not preclude the defendant from claiming an easement over the land which is all it could acquire, either under the laws of the United States, or the Revised Statutes of Florida.

Fifth. Because the defendant contended at the trial, that under the laws of the United States, plaintiff was not entitled to a judgment for mesne profits, or for damages either before or after the patent issued. See Assignments of Error 7, 8, 9 and 10, Record, pages 183-4.

Sixth. Even if the defendant had withdrawn his plea of not guilty, and filed a paper amounting to an absolute disclaimer of any interest in the property, or a judgment by default had been taken against the defendant company, still the declaration shows a case under the laws of the United states, because the plaintiffs would still have to establish, as they did establish, that they were entitled to mesne profits from the time they initiated their claim under the pre-emption laws, or at least from the time they tendered the Government price for the land under the pre-emption laws. This point is well settled.

80 Fed. Rep., 443, 167 U. S. 65.

Not only that, but the plaintiff, under the conditions stated, would have to prove that the patent was duly executed, and that the land was subject to pre-emption claim, and that it had not been previously disposed of under the laws of the United States.

We repeat the proposed plea did not admit plaintiff's right to mesne profits nor damages to realty, and the rights of possession and mesne profits, before patent depended absolutely upon the pre-emption laws of the United States.

Revised Statutes United States, Sections 2257 to 5270.

We may have unnecessarily mingled argument on other questions with argument to establish that *there is not in the record*, any basis for the assignment of error.

It is a fundamental rule, needing no authority, that, where there is no plain error, in the Record unassigned, as in this case, and no basis for the errors assigned the writ will be dismissed or judgment affirmed. It is submitted:

First—The writ should be dismissed for that reason.

Second—It should be dismissed, because the writ does not lie as a matter of right, in such a case.

AFFIRMANCE

Third—Even if the Court has jurisdiction it is manifest the writ was taken for delay only, and the question of jurisdiction and other questions have been so often upheld in like cases, that they are so frivolous as not to need further argument.

Hinckey vs. Morton 103, U. S., 764.

Evans vs. Brown 109, U. S., 180.

Foster vs. Kansas 112, U. S., 296.

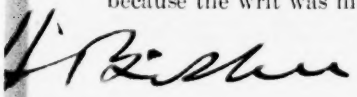
The precise questions that there was jurisdiction *both on the ground* that plaintiffs claimed *directly under a patent against defendent denying their title by a plea of not guilty*, and on the ground of *claiming mesne profits* under the laws of the United States, prior to the issue of the patent have been settled by this Court.

Doolon vs. Carr 125, U. S., 618.

Railway Co. vs. Zeigler 167, U. S., 65, and by Court of Appeals 87, Fed. Rep. 373–4.

The decisions, ruling that there was no jurisdiction, where the plaintiffs *derived title through a patent have no application to the case at bar.*

If a motion was pending to strike from the record the assignments of error, because there is no basis for them, unquestionably it would be granted. This being so the judgment should be affirmed, with damages, because the writ was made out for delay only.



H. Bisbee,
for Defendants in Error.

FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY *v.* BELL.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 95. Argued and submitted December 22, 1899. — Decided February 26, 1900.

As the plaintiffs in the Circuit Court claimed in their declaration that the controversy was one that turned on the construction of the laws of the United States, and as both courts below dealt with the case on that assumption, this court has jurisdiction to review the judgment of the Circuit Court of Appeals.

As the plaintiffs, some of whom were citizens of Florida, and some of whom were citizens of Texas, elected to assert a joint claim to land in Florida in dispute in this case, which was commenced before the Circuit Court of the United States for the Southern District of Florida, and carried by appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and as they recovered a joint judgment for their undivided interests therein, and as the plaintiffs' declaration disclosed no Federal question, the principles settled in the cases cited by the court in its opinion apply, and compel a dismissal of the suit for want of jurisdiction in the Circuit Court.

In the Circuit Court of the United States for the Southern District of Florida, William J. Bell, John W. Bell, Frank A. Bell, citizens of the State of Texas; E. A. Bell, Matilda P. Feihe, all heirs of and children of Louis Bell, deceased, late of Hillsborough County, State of Florida; and George A. Bell and Simon Bell, heirs of and grandchildren of said Louis Bell; and Anton Feihe, husband of said Matilda P. Feihe, brought an action of ejectment against the Florida Central and Peninsular Railroad Company, a corporation of the State of Florida, seeking to recover possession of about seven acres of land in Hillsborough County, Florida, alleged to be of the value of thirty thousand dollars, and damages in the sum of ten thousand dollars. The declaration alleged that the land in controversy was occupied by defendant as its roadbed and right of way, and that the plaintiffs claimed title to said land under and by virtue of a patent granted by the United States

to said Louis Bell and his heirs upon a preëmption claim filed in the local land office of the United States in 1883, and upon appeal to the general land office, and upon and from an appeal from the decision of the Commissioner of the general land office to the Secretary of the Interior of the said United States, when by the order of the said Secretary the said patent was granted. The declaration further alleged that, in the proceedings in the land department, the defendant claimed and contended that the plaintiffs were not, under any of the laws of the United States, entitled to have a patent to said land granted to said Louis Bell and his heirs, and that the defendant, at the time of the commencement of this suit, claimed and insisted that the plaintiffs derived no title to said land under and by virtue of the said patent, and at the same time claimed that under the laws of the United States, and especially under and by virtue of the first section of an act of Congress entitled "An act granting public lands in alternate sections to the States of Florida and Alabama to aid in the construction of certain railroads in said States," approved May 17, 1856, c. 31, 11 Stat. 15, it was entitled and had the right to locate the route of its railroad and construct the same through the said lands, and to be in possession thereof, on the ground, among other grounds, that the said land was a part of that tract of land, which constituted at one time a military reservation, known as the Fort Brook Military Reservation at Tampa, State of Florida. And the plaintiffs further alleged in their declaration that after the passage of an act of Congress entitled "An act to provide for the disposal of abandoned and useless military reservations," approved July 5, 1885 [1884? See 23 Stat. 103], they contended for and claimed title and a patent to said parcel of land, under and by virtue of the first proviso of the second section of the last-mentioned act of Congress, both in the office of the said General Land Office and of the Secretary of the Interior, and that the defendant appeared in both of the said offices, by its counsel, and there claimed and contended, and at the commencement of this suit claimed and contended, that plaintiffs were not entitled to a patent or title to said parcel of land under the

said proviso of said act of Congress, and, at the times aforesaid, claimed and insisted that it was entitled to locate the route of its railroad through said parcel of land and to be in possession thereof under and by virtue of the third proviso of the aforesaid act of Congress approved May 17, 1856.

This declaration was filed on December 29, 1896, and on January 4, 1897, the defendant appeared and filed a plea of not guilty.

On February 4, 1897, the defendant, after notice to the plaintiffs, asked leave to file further and special pleas, denying that the court had jurisdiction of the action, denying that the defendant claimed title under the act of May 17, 1856, or under any other act of Congress or law of the United States, and alleging the pendency of a prior suit in equity between the same parties in the Circuit Court of the United States and also the pendency in the Circuit Court of the sixth judicial circuit of the State of Florida, of a petition and proceeding by the defendant to condemn the land in dispute under its right of eminent domain under the laws of the State of Florida.

Thereafter, on February 18, 1897, the court made the following order:

"This cause coming on to be heard upon the motion of the defendant for leave to file additional pleas and upon the motion of the plaintiffs to transfer the cause to Tampa for trial, and it having been fully heard and considered, and it appearing that none of said pleas constitute a good defence to said action that could not as well be shown under the general plea of not guilty, it is ordered that said motion to file additional pleas be denied, and that the order to transfer the cause for trial be granted, and that this order be without prejudice to any motion for a stay of an enforcement possession under any judgment which may be recovered on account of condemnation proceedings."

On February 10, 1897, the defendant moved for a continuance, which motion was on February 18 denied.

On March 5, 1897, the defendant moved the court to "dismiss the cause, for the reason that there is nothing on the face

Counsel for Plaintiff in Error.

of the declaration to show that this court has jurisdiction to hear and determine the said cause."

On March 11, 1897, after a consideration of this motion to dismiss, it was ordered in open court that said motion be dismissed. On the same day, an agreement, signed by the attorneys of the respective parties, to waive a jury and that the cause might be tried by the court, was filed.

The cause was so proceeded in that on March 23, 1897, the court found that the plaintiffs were entitled to possession and have a fee simple title in and to the land in dispute, and assessed their damages in loss of rent and profit in the sum of nineteen hundred and fifty-five dollars, and entered a judgment as follows:

"It is considered by the court that the plaintiffs herein, William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell and Matilda P. Feihe, and George A. Bell and Simon Bell, do receive and recover from the defendant, the Florida Central and Peninsular Railroad Company, the sum of nineteen hundred and fifty-five dollars, as well as for costs in this behalf; and it is further considered that said plaintiffs have a fee simple title in and to the lands and premises described as follows, to wit," etc.

On April 10, 1897, the defendant moved the court for a writ of error and a citation to review the judgment in said cause, returnable to the United States Circuit Court of Appeals, and for a supersedeas of the said judgment upon filing a bond. On the same day the writ of error was allowed, and it was ordered that, on the defendant filing a bond with sufficient sureties in the sum of thirty-five hundred dollars, to be approved by the court or by the clerk thereof, the said writ should operate as a supersedeas of the judgment in said cause. A bond was approved and filed accordingly.

On May 24, 1898, the Circuit Court of Appeals affirmed the judgment of the Circuit Court. 59 U. S. App. 189.

And thereupon, on June 2, 1898, a writ of error from this court was allowed.

Mr. J. C. Cooper for plaintiff in error. *Mr. J. A. Hender-*

son was on his brief. *Mr. William Wirt Howe* also filed a brief for same.

Mr. H. Bisbee for defendants in error submitted on his brief.

Mr. Justice Shiras, after making the above statement, delivered the opinion of the court.

Our first inquiry is whether this court has jurisdiction to review the judgment of the Circuit Court of Appeals. The writ of error in this case was brought under section six of the judiciary act of March 3, 1891. If the judgment of the Circuit Court of Appeals was final, under that section, this writ of error must be dismissed. In order to maintain our jurisdiction it must appear that the jurisdiction of the Circuit Court was not dependent solely upon the opposite parties being citizens of different States. *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138; *Press Publishing Co.* v. *Monroe*, 164 U. S. 105.

This question must be answered upon an inspection of the declaration of the plaintiffs in the Circuit Court. Does it disclose that the plaintiffs invoked the jurisdiction of that court because the parties were citizens of different States, or because the case was alleged to be one arising under the Constitution, laws or treaties of the United States?

The action was in ejectment to recover possession of a tract of land in Hillsborough County, State of Florida. The plaintiffs were eight in number, three of whom were alleged to be citizens of the State of Texas, and there was no allegation as to the citizenship of the other five. The defendant, the Florida Central and Peninsular Railroad Company, was alleged to be a corporation organized and existing under the laws of Florida. Hence, upon the face of the declaration, the jurisdiction of the Circuit Court would have failed, at least as to five of the plaintiffs, if that jurisdiction depended solely on the citizenship of the parties. The declaration, however, alleges that the plaintiffs claim title to the land in dispute by virtue of a patent granted to their ancestor by the Government of the

United States; that the defendant claimed title under the first section of an act of Congress, entitled "An act granting public lands in alternate sections to the States of Florida and Alabama, to aid in the construction of certain railroads in said States," approved May 17, 1856; and further, that the defendant railroad company claimed and insisted that it was entitled to locate and maintain the route of its road through the land in question under said act of Congress.

Accordingly, it appears that the theory of the plaintiffs, in bringing their suit in the Circuit Court of the United States, was that the controversy was between a patentee of the United States and a railroad company claiming a right to occupy the land embraced in the patent by virtue of an act of Congress, and was therefore a case arising under the laws of the United States. This was the view of the judge who tried the case in the Circuit Court, as he refused to grant the defendant's motion to dismiss for want of jurisdiction, and this view was also taken by the Circuit Court of Appeals, as appears in the following passage of its opinion:

"There is no effort in this case to found the jurisdiction of the court on the diverse citizenship of the parties. There is nothing in the record to indicate that the Judge of the Circuit Court entertained jurisdiction of the case on that ground. The declaration shows that in the preëmption claim by the ancestor of the defendants in error to the land involved, the claim was stoutly resisted by the plaintiff in error in the different stages of the prosecution thereof and before the different officers of the land department. It shows that under a named act of Congress, approved May 17, 1856, the defendant claimed the right to occupy the land in question in the manner that it was occupying it, without accountability to the defendants in error. . . . So that, independently of the claim for mesne profits for the time transpiring between the preëmption entry and the issuance of the patent, it is clear that the issues made by the declaration presented a case within the jurisdiction of the Circuit Court."

As, then, the plaintiffs in the Circuit Court claimed in their declaration that the controversy was one that turned on a con-

struction of the laws of the United States, and as both the courts below dealt with the case on that assumption, it is plain that it cannot be successfully contended in this court that the judgment of the Circuit Court of Appeals was final because the jurisdiction of the Circuit Court was dependent entirely upon the opposite parties being citizens of different States.

Nor do we find merit in a second ground urged to maintain the motion to dismiss, namely, that the action was in ejectment; that the defendant admitted of record that it had no title; and that therefore the only question it could raise was one of jurisdiction. An inspection of the defendant's answer shows that, while it did disclaim title under the act of Congress, it claimed a right of possession on other grounds, with respect to which it had a right to be heard, if indeed the Circuit Court had jurisdiction.

We come to the case, then, as one in which we have a right to supervise the judgment of the Circuit Court of Appeals. And the first question, and indeed, as we read the record, the only one we have to meet, is whether the Circuit Court had jurisdiction of the case. Not having, as we have seen, jurisdiction because of a controversy between citizens of different States, did it have jurisdiction because the case was one arising under the Constitution or laws of the United States? This question was answered affirmatively in both courts below, and this because, as it seemed to them, the plaintiffs' declaration disclosed such a case.

It must be regarded as conclusively established by our decisions that the jurisdiction of the Circuit Court must appear in the plaintiffs' statement of their case.

"When the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of Federal nature, it must appear, at the outset, from the declaration or bill of the party suing, that the suit is of that character; in other words, it must appear in that class of cases that the suit is one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer or motion, or upon

its own inspection of the pleadings, must dismiss the suit, just as it would remand to the state court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the Circuit Court. It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind." *Metcalf* v. *Watertown*, 128 U. S. 588; *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138; *Oregon &c. Railway* v. *Skottowe*, 162 U. S. 490; *Hanford* v. *Davies*, 163 U. S. 273; *Press Publishing Co.* v. *Monroe*, 164 U. S. 105.

We do not, however, understand that these cases are questioned by the defendants in error, but their contention is that in the plaintiffs' declaration it did sufficiently appear that a Federal question was necessarily involved, upon the solution of which the determination of the case depended.

The paragraph of the declaration which sets forth the plaintiffs' claim is as follows:

"The plaintiffs allege that they claim title to the said land under and by virtue of a patent granted by the Government of the United States of America to the said Louis Bell and his heirs, upon a preëmption claim for said land under the laws of the United States, originally commenced and filed in the local land office of the United States of America at Gainesville, Florida, in 1883, and presented by the heirs of the said Louis Bell and his heirs, the plaintiffs, in said land office; and upon appeal in the general land office of the Government and upon and from an appeal from the decision of the commissioner of the general land office to the Secretary of the Interior of the United States, the said heirs prosecuted to the preëmption claim, until by the order and decision of the said Secretary the said patent was granted."

In view of the frequent and recent decisions of this court on this subject, it is not necessary to argue the proposition that the mere assertion of a title to land derived to the plaintiffs, under and by virtue of a patent granted by the United States, pre-

sents no question which, of itself, confers jurisdiction on a Circuit Court of the United States. *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571.

But it seems to be thought that, by alleging that the defendant claimed and contended, in the land department, that the plaintiffs were not entitled, under any of the laws of the United States, to have a patent granted to them, and that the defendant at the time of the commencement of this suit claimed and insisted that the plaintiffs derived no title to the said land under and by virtue of the said patent, and at said time claimed that, under the laws of the United States, and especially under and by virtue of the first section of an act of Congress, entitled "An act granting public lands in alternate sections to the States of Florida and Alabama, to aid in the construction of railroads in said States," approved May 17, 1856, it was entitled and had the right to locate the route of its railroad and construct the same through the said lands, and to be in possession thereof, on the ground, among other grounds, that the said section eight was a part of that tract of land which constituted at one time a military reservation known as the Fort Brooke Military Reservation, at Tampa, State of Florida, there was presented a question needing for its solution a construction of laws of the United States.

It is obvious that all that is added, by these allegations, to the plaintiffs' statement of their own claim, is a statement of what the defendant claimed before and at the time of the commencement of this suit in respect to its own title. The plaintiffs were not pretending to have title under the act of May 17, 1856, however it might be construed. That act was, under the allegations of the declaration, the source of the defendant's title, but it could not affect the plaintiffs' title unless it were pleaded and set up by the defendant. It has been several times held by this court that the plaintiff, if the statement of his own claim does not disclose a Federal question, cannot create jurisdiction in a Circuit Court by anticipating the defendant's claim, and by alleging that the defendant will set up a defence under some law of the United States.

Thus in *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454, 464, Mr. Justice Gray, after citing *Metcalf* v. *Watertown*, 128 U. S. 586, and other cases, said:

"In each of the three cases now before this court, the only right claimed by the plaintiffs is under the law of Tennessee, and they assert no right whatever under the Constitution and laws of the United States. In the first and second bills the only reference to the Constitution or laws of the United States is the suggestion that the defendants will contend that the law of the State under which the plaintiffs claim is void, because in contravention of the Constitution of the United States; and by the settled law of this court, as appears from the decisions above cited, a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws."

Chappell v. *Waterworth*, 155 U. S. 102; *East Lake Land Co.* v. *Brown*, 155 U. S. 488; *Oregon Short Line Co.* v. *Skottowe*, 162 U. S. 490.

And, even if it could be held that, by anticipating a supposed defence, a Federal question might be made to appear to be involved in the controversy, jurisdiction in the Circuit Court would fail if, on the coming in of the plea or answer, the defence would turn out to be based on matter wholly independent of the Constitution or any law of the United States, and it would be the clear duty of the court to dismiss the suit for the reason that it did not "really and substantially involve a dispute or controversy within the jurisdiction of that court."

So it was held in *Robinson* v. *Anderson*, 121 U. S. 522, 524, where an order of the Circuit Court dismissing the case was affirmed, this court saying, through Mr. Chief Justice Waite:

"Even if the complaint, standing by itself, made out a case of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defences against the title of the plaintiff would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defences were

relied on. The Circuit Court cannot be required to keep jurisdiction of a suit simply because the averments in a complaint or declaration make a case arising under the Constitution, laws or treaties of the United States, if, when the pleadings are all in, it appears that these averments are immaterial in determination of the matter really in dispute between the parties, and especially if, as here, they were evidently made 'for the purpose of creating a case' cognizable by the Circuit Court, when none in fact existed."

Such observations are directly applicable to the present case, for the defendant, in its plea to the jurisdiction of the court, explicitly admitted the plaintiffs' title to the land under the patent, and denied that the defendant claimed title to the land in dispute under the act of May 17, 1856, or under any other act of Congress, but placed its defence, by way of confession and avoidance, on totally different grounds than those mentioned in the declaration, and which involved no construction or application of the Constitution or laws of the United States.

It is contended, however, that, whether or not the Circuit Court had jurisdiction to determine the question of title to the land in dispute or of the right of possession thereof, the plaintiffs' demand to recover mesne profits, accruing between the preëmption entry and the issuance of the patent, presented a question within the jurisdiction of that court. It is not easy to perceive why, if the Circuit Court did not possess jurisdiction to decide the right of possession, it could have jurisdiction to pass upon the question of mesne profits, the right to recover which would depend on the right of possession.

In affirming this view of the case, the Circuit Court of Appeals cites *Durango Land & Coal Company* v. *Evans*, 49 U. S. App. 305. That was a case where the Circuit Court of Appeals of the Eighth Circuit held that the inquiry as to the right of the plaintiff to recover mesne profits, accruing while the alleged contest was depending and undetermined in the general land office, involved an examination and construction of the laws of the United States. The case was brought to this court, but was dismissed on stipulation of the

parties. The report of the case does not disclose whether there was really a controversy between the parties respecting the construction of the land laws of the United States. What really seems to have been involved, in respect to mesne profits, was whether the doctrine of relation, which is a common law doctrine, would enable the plaintiff, after having established his title, to recover the mesne profits which accrued while the plaintiff was wrongfully excluded from possession. Such a question would not seem to be a Federal one, but one incidental to the determination of the principal controversy concerning the right of possession.

At all events, there is nothing disclosed in the declaration in the present case showing that, so far as the damages and mesne profits are concerned, any Federal question was presented. If the Circuit Court had jurisdiction to determine the right of possession, and, in the exercise of that jurisdiction, decided in the plaintiffs' favor, the incidental question of the time when damages and profits would accrue to the plaintiffs would legitimately arise. But if that court had not jurisdiction to determine the controversy as to the right of possession, it could not draw to itself the jurisdiction of the case by considering what the consequences would be if the plaintiffs were permitted to recover possession.

Apart from the question of jurisdiction arising from the presence of any Federal question, can it be said that jurisdiction did attach in respect to those plaintiffs who were alleged to be citizens of Texas?

As we have seen, neither of the courts below were of that opinion. The judgment of the Circuit Court was in favor of all the plaintiffs jointly for the entire tract in dispute, and in so doing, followed the plaintiffs' claim in their declaration, wherein they claimed title to the whole tract as belonging to them jointly. They did not allege that they were tenants in common, although in the findings the court found that the respective plaintiffs held undivided interests in the land.

In *Strawbridge* v. *Curtiss*, 3 Cranch, 267, it was said: "Where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued,

in those (Circuit) Courts, but the court does not mean to give an opinion in the case where several parties represent several distinct interests, and some of those parties are, and others are not, competent to sue or liable to be sued, in the courts of the United States."

New Orleans v. *Winter*, 1 Wheat. 91, 94, was the case of a possessory action brought by the heirs of Elisha Winter, deceased, to recover the possession and property of certain lands in the city of New Orleans. One of the petitioners was described in the record as a citizen of the State of Kentucky, and the other as a citizen of the Territory of Mississippi. The plaintiffs recovered a judgment in the Circuit Court, but this judgment was reversed by this court, Chief Justice Marshall saying:

"Gabriel Winter, then, being a citizen of the Mississippi Territory, was incapable of maintaining a suit alone in the Circuit Court of Louisiana. Is his case mended by being associated with others who are capable of suing in that court? In the case of *Strawbridge* v. *Curtiss* it was decided that where a joint interest is prosecuted, the jurisdiction cannot be sustained, unless each individual be entitled to claim that jurisdiction. In this case it has been doubted whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite. The Circuit Court of Louisiana, therefore, had no jurisdiction of the cause, and their judgment must, on that account, be reversed, and the petition dismissed."

In *Barney* v. *Baltimore*, 6 Wall. 280, it was held that part owners or tenants in common in real estate, of which partition is asked in equity, have an interest in the subject-matter of the suit, and in the relief sought, so intimately connected with that of their cotenants, that if these cannot be subjected to the jurisdiction of the court, the bill will be dismissed.

Hooe v. *Jamieson*, 166 U. S. 395, was an action of ejectment brought in the Circuit Court of the United States for the Western District of Wisconsin, by a complaint in which the plain-

tiffs alleged that they resided in and were citizens of the city of Washington, D. C., and that defendants all resided in and were citizens of the State of Wisconsin. Defendants moved to dismiss the action on the ground that the Circuit Court had no jurisdiction, as the controversy was not between citizens of different States. The Circuit Court ordered that the action be dismissed unless plaintiffs within five days thereafter should so amend their complaint as to allege the necessary jurisdictional facts. Plaintiffs then moved for leave to amend their complaint by averring that three of them were when the suit was commenced, and continued to be, citizens of the District of Columbia, but that one of them was a citizen of the State of Minnesota, and that each was the owner of an undivided one fourth of the lands and premises described in the complaint, and that they severally claimed damages and demanded judgment. This motion was denied, and the action dismissed. Plaintiffs sued out a writ of error, and the Circuit Court certified to this court these questions of jurisdiction: First. Whether or not said complaint set forth any cause of action in which there is a controversy between citizens of different States, so as to give said Circuit Court jurisdiction thereof. Second. Whether or not said complaint as so proposed to be amended would, if so amended, set forth any cause of action in which there is a controversy between citizens of different States so as to give said Circuit Court jurisdiction thereof. This court held, through Mr. Chief Justice Fuller, after reviewing the cases, that the voluntary joinder of the parties had the same effect for purposes of jurisdiction as if they had been compelled to unite; that as no application was made to discontinue as to the three plaintiffs who were citizens of the District of Columbia, and to amend the complaint and proceed with the cause in favor of that one of the plaintiffs alleged to be a citizen of Minnesota, jurisdiction as to four plaintiffs could not be maintained on the theory that when the trial terminated it might be retained as to one. Accordingly the judgment of the Circuit Court was reversed.

As, then, in the present case, the plaintiffs elected to assert a joint claim and title to the land in dispute, and recovered a

joint judgment for their undivided interests therein, and as the plaintiffs' declaration discloses no Federal question, the principles of the cited cases apply, and compel a dismissal of the suit for want of jurisdiction in the Circuit Court.

This conclusion withdraws from our consideration the errors assigned to the action of the courts below in respect to the defendant's several pleas of *lis pendens*.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is likewise reversed, and the cause is remanded to that court with directions to dismiss the action for want of jurisdiction.